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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

GEORGE S. MCLEAN,
Defendant-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 16, 1984

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QUESTIONS PRESENTED

1. Whether the indictment of the Petitioner in the *Crawford* case as an alleged participant in a conspiracy (Count 1) to bribe high level Pemex officials is barred by the Eckhardt Amendment to the Foreign Corrupt Practices Act ("FCPA") which has a major objective to allow the Petitioner the benefit of the superior resources of his corporate employer in presenting a defense in the criminal proceeding and preventing the employer from making the Petitioner a scapegoat.

2. Whether a defense based on the Eckhardt Amendment to the FCPA is a claim that falls within the grounds this Court has delineated to qualify as an exception to the "final decision" rule for the purposes of 28 U.S.C. §1291 and therefore may be properly appealed by the Petitioner prior to trial.

3. Whether the Petitioner's failure to file a formal cross-appeal for the dismissal of the conspiracy count bars an appeals court's review of the issue when the Petitioner had previously filed a motion to dismiss the count in the District Court and had argued for dismissal in his Appellee's brief.

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OCTOBER TERM, 1984

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UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

GEORGE S. MCLEAN,
Defendant-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner respectfully prays that a writ of certiorari be issued to review the Order and Opinion of the United States Court of Appeals for the Fifth Circuit entered on August 10, 1984 which affirmed the District Court's decision to dismiss the 43 aiding and abetting counts but declined to act on the Petitioner's Motion to dismiss the conspiracy count.

JURISDICTION

An order and opinion was rendered by the United States Court of Appeals for the Fifth Circuit affirming the District Court's order to dismiss 43 aiding and abetting counts against the Petitioner but declining to review a motion to dismiss a conspiracy count. A copy of this order and opinion and a copy of the order denying the Motion for P nel Reconsideration on the issue of the conspiracy count are found at Appendices A and B.

The order affirming the District Court's order but declining to review the other issue was entered on August 10, 1984. A timely Motion for Panel Reconsideration was filed and subsequently denied on September 19, 1984. This Petition for a Writ of Certiorari has been filed within the statutory period provided by the Supreme Court Rules, Rule 20.1.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Attention is invited to the fact that the "scapegoat" issue and factual background involved in this Petition for a Writ of Certiorari are the same as in the Petition for Writ of Certiorari in an expungement case received by the Supreme Court on March 12, 1984, *George S. McLean vs. United States of America,* Docket No. 83-1504, (denied).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

1. U.S. Const. Amend. VI
2. 28 U.S.C. §1254(1)
3. 28 U.S.C. §1291 (1976)
4. 15 U.S.C. §78dd - 2(a)(1) and (3)

5. 15 U.S.C. §78ff(c)(3)
6. 18 U.S.C. §371
7. 18 U.S.C. §3
8. H.R. Rept. No. 96-640 (1977)
9. H.R. Rept. No. 95-831 (1977)
10. H.R. Rept. No. 95-11 (1977) at 225-233
11. Supreme Court Rules, Rule 17.1
12. Supreme Court Rules, Rule 20.1

STATEMENT OF THE CASE

This appeal stems from the Fifth Circuit's failure to review the Petitioner's Motion to dismiss a conspiracy count in *U.S. v. Crawford Enterprises, Inc.*, Cr. No. H-82-224 (S.D. Texas 1982), a case in which the Petitioner has been charged as a participant in an alleged conspiracy to bribe Mexican officials.

Petroleos Mexicanos ("Pemex") is the national petroleum company of Mexico. From 1977 to 1980 Pemex carried out an accelerated development program so that crude oil production would be increased from 1.1 to 2.2 million barrels per day by 1980, with the greater part of the increase sold for export. Approximaely 2 billion cubic feet of raw natural gas known as "associated gas" was produced with the increased oil flow and was initially flared. The 1976 National Energy Plan, ("PLAN") earmarked this associated gas to be processed in new plants for the removal of corrosive sulfur compounds and hydrocarbon liquids. The Mexican government issued an order in 1977 to stop flaring the associated gas. It was necessary for Pemex to accelerate the purchases of large quantities of turbine compressor equipment to capture the associated gas and pump it to the processing plants.

The Solar Division ("Solar") of International Harvester Company ("Harvester") was the dominant worldwide supplier of the type of turbine compression equipment needed. Solar had supplied Pemex with approximately 70% of their requirement for similar equipment in the previous 5 years either as a prime contractor or as a subcontractor.

Petitioner, an 18-year employee of Solar/Harvester, was a vice president of Solar, the president of Solar Turbines, Ltd., a 200-employee Harvester overseas subsidiary, and had worldwide sales and services responsibilities for Solar. During the period involved in the Harvester case, the Petitioner was on the Harvester corporate payroll and was paid from Harvester's headquarters office in Chicago. The Petitioner participated in Harvester's executive incentive plan and stock option plan. The Petitioner reported directly to O.M. Sievert, ("Sievert") the president of Solar. Harvester commenced preparations to sell Solar in the fall of 1980. Sievert was also a Harvester officer from 1974 to 1980.

Luis A. Uriarte ("Uriarte") was the Solar regional sales manager for Latin America.

Crawford Enterprises, Inc. ("CEI") was a broker and lessor of gas compression systems of all types and sizes. Solar had sold equipment to CEI for resale or lease over a period of several years. Solar, from time to time, acted as a subcontractor for CEI which contracted with Pemex to build complete compression plants.

In early 1979, the United States initiated the first of several grand jury investigations into the alleged bribery of and conspiracy to bribe Mexican officials in violation of the Foreign Corrupt Practices Act ("FCPA").

In the fall of 1982 the government instituted four

criminal cases allegedly involving a scheme to bribe two high level Pemex officials, *U.S. v. C.E. Miller Corp.*, Cr. No. 82-288 (C.D. Cal.); *U.S. v. Ruston Gas Turbines, Inc.*, Cr. No. H-82-207 (S.D. Tex.); *U.S. v. Crawford Enterprises, Inc., et al.*, Cr. No. H-82-224 (S.D. Tex.); *U.S. v. International Harvester Co.*, Cr. No. H-82-244 (S.D. Tex.).

On October 22, 1982, the United States indicted the Petitioner in the *Crawford* case and described the Petitioner as being a participant in the conspiracy to pay bribes to the Pemex officials. The Petitioner was also charged with aiding and abetting substantive violations of the FCPA in 43 of the remaining 48 counts of the *Crawford* case.

On the afternoon of November 17, 1982 in Federal District Court in Houston, Harvester was charged under 18 U.S.C. §371 in a one-count Information with the felony of conspiracy to violate the FCPA, 15 U.S.C. §78dd-2. The Petitioner and Uriarte were identified and described in the Information and related Offer of Proof as participants in the alleged bribery scheme conspiracy. The single count *Harvester* Information included 11 of the 12 overt acts set forth in the *Crawford* Indictment in which in 11 acts, Solar, and/or the Petitioner and/or Uriarte were identified by name. The *Harvester* Information identified Uriarte by name in overt acts Nos. 1, 3, 8 and 11 and identified the Petitioner in No. 11, in the same manner that they were named in the corresponding overt acts in the *Crawford* Indictment. The 12th overt act from the *Crawford* case involving Harvester personnel also involved O.M. Sievert, the president of Solar and a Harvester corporate officer. This 12th overt act involved a meeting in Las Vegas with CEI and another company. No reference was made to this overt act in the *Harvester* In-

formation or Offer of Proof. Overt Act No. 11 in the *Harvester* Information is the same as Overt Act No. 89 in the *Crawford* Indictment. Discovery of grand jury and other testimony would later allege that Sievert met with Crawford at this meeting. However, the Petitioner was charged in the Overt Act No. 89, although there is no testimony linking him to the meeting and Sievert was not so much as mentioned amongst the "and others" in the bill of particulars.

The conspiracy described in the *Harvester* Information was predicated upon a theory of respondeat superior. The Offer of Proof described Harvester's written corporate antibribery policy and contained the following statement:

> "During those years, Uriarte and McLean each reported in the annual audit process that he was aware of International Harvester policy and had taken no action in violation thereof. Insofar as each of them participated in the conspiracy described herein, he accordingly concealed from International Harvester his participation and the participation of the Solar Turbine Division. Neither Solar employee held a position which required him to report to International Harvester management. There has been no evidence that any officers, directors or management knew of or participated in the conspiracy charged in the Information."

The Petitioner first learned of the references to him in the *Harvester* Information and Offer of Proof while sitting in the courtroom during the Harvester arraignment hearing on November 18, 1982, when he heard the accusations against him.

Harvester, through its lawyers, commenced plea bargain negotiations with the government without notifying the Petitioner and Uriarte of the negotiations. Upon hear-

ing a rumor about the plea bargain negotiations on November 3, 1982 the Petitioner and Sievert confronted Harvester lawyers and officials by telephone and mail with the rumor and told them that any representations made by the United States as to the culpability of Harvester and Harvester (Solar) employees were incorrect and that competent evidence was in existence and available to refute the contentions being made by the United States in respect to Harvester.

A plea bargain was negotiated between the United States and Harvester on the following terms:

> 1) Harvester would plead guilty to a charge of conspiring with CEI, the Petitioner and others to violate the FCPA.
>
> 2) The United States' Offer of Proof would state that:
>
> > (a) There was no evidence that officers, directors, or the management of Harvester knew of or participated in the conspiracy, i.e. Sievert would be sheltered and protected in the plea bargain by ignoring Sievert's status within Harvester as a vice president and corporate officer of Harvester even though Grand Jury testimony and the Harvester table of organization showed that Sievert was a vice president and officer of Harvester.[1/2]

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[1]In early 1983, in the government's response to the Petitioner's Motion for a Bill of Particulars in the *Crawford* case, the government stated that: (1) Harvester and Sievert were known to have also been part of the conspiracy to bribe Pemex officials; (2) in March 1978 Sievert participated with CEI and the Petitioner in a meeting in Las Vegas to discuss Pemex business which was the substance of the charge in overt act 24 of Count one of the Crawford indictment; and (3) Sievert permitted bids to be calculated.

[2]Sievert was protected from indictment in the Crawford case and from charges in the Harvester case.

(b) Harvester's management was unaware of the actions of its lower echelon employees; i.e., the Petitioner and Uriarte.

At the arraignment hearing on November 18, 1982 Harvester's general counsel Elmer Johnson advised the Court as follows:

> "As to the factual basis for plea, we accept the *strong representations of the Justice Department of the United States* that they have more than adequate evidence to prove that two of our former employees of a former division aided and abetted violations of the Foreign Corrupt Practices Act. *We simply are not in a position to verify these representations.* As the Offer of Proof points out, any such activities by these former employees would have been in full violation of Harvester's long-standing code of ethical conduct; and there is no evidence, as the Offer of Proof points out, that any directors or officers or management of Harvester knew about or participated in the conspiracy. Harvester has been named solely on the theory of *respondeat superior* under which management's lack of knowledge is not a defense as to the Foreign Corrupt Practices Act and therefore as to the conspiracy count to which we are pleading." (emphasis added)

> "Now as Your Honor may know, Harvester is in extremes. It is in the midst of the biggest voluntary restructuring effort in the history of corporate America. . . . We are turning creditors into stockholders. Our management and financial resources are stretched to their limit. It is against this background that we have decided to plead guilty and try to put this matter behind us so that we can put all our energies into one fight for survival." (emphasis added)

Harvester was fined $10,000 and ordered to pay $40,000 in costs. Harvester noted in its 1982 annual report that it "entered a plea of guilty, in order to avoid costly litigation."

The foregoing events involving Harvester were reported by the *Wall Street Journal;* for example on November 16, 1982, the *Wall Street Journal* quoted a Harvester spokeswoman as stating the Justice Department – "must recognize that our management has adhered to the highest ethical standards, wasn't aware of the alleged payoffs and didn't condone them"; and on the morning of November 18, 1982 the *Wall Street Journal* reported, "Harvester said the Justice Departmemt will present documents in court that will include a statement by the department that there wasn't any evidence that Harvester officers, directors and management knew of or participated in the alleged conspiracy."

The Petitioner, on January 12, 1983, filed an application to expunge references to him from the *Harvester* Information and Offer of Proof. The application was denied and the Petitioner filed an appeal. The government, in their Appellee's brief to the Fifth Circuit stated,

> "Appellant simply has no standing to complain that allegations involving International Harvester's culpability set forth in a bill of particulars [in the Crawford case] *deviated* from statements made in an Offer of Proof [in the Harvester case] in connection wtih that corporation's guilty plea."
>
> "It is likewise of no consequence to Appellant's case that, *contrary* to assertions made by government attorneys in a bill of particular, statements were previously made in an Offer of Proof in the

> International Harvester guilty plea proceeding that the government has no evidence that International Harvester's own officers knew of or participated in the bribe. This assertion, the product of guilty plea negotations between International Harvester and attorneys for the government, does not affect Appellant's interest in the least." (emphasis added)

On October 28, 1983, Petroleos Mexicanos (Pemex) filed a civil suit, C.A. No. H-83-6418 S.D. Tex., against Harvester and sixteen other companies and individuals, for alleged violations of the Sherman, Robinson-Patman and Racketeering Acts, as well as a commercial bribery count in an alleged conspiracy involving substantially the same facts as alleged in the Harvester case and in Count 1 in the Crawford case. The Petitioner was not named as a Defendant or in any other capacity in the Pemex suit. Pemex asks for treble damages totalling $135,000,000.

In its answer dated December 23, 1983, Harvester, without any attempt to explain or reconcile its November 18, 1982 plea of guilty to a conspiracy charge based upon collaboration with CEI on pricing stated in paragraphs 42 and 43 of its answer:

> "42. Harvester denies that it joined a conspiracy with Crawford, Ruston, or Cemco. . . ."
>
> "43. Harvester denies that it collaborated with Crawford, Cemco, Ruston or CEI in preparing bids to Pemex. . . ."

When Uriarte could no longer afford staying in the case, Uriarte pled guilty to an 18 U.S.C. §3 violation in September 1983 (specifically, withholding information from a government investigator) as part of a plea bargain. Uriarte was sentenced to 12 months probation with no restrictions.

Shortly thereafter, the government sent a written invitation to the Petitioner to negotiate a plea bargain that was similar to the one negotiated with Uriarte. The Petitioner refused the offer of the plea bargain.

The 43 aiding and abetting counts against the Petitioner were dismissed by the District Court in June 1983. In August 1983, the Petitioner motioned for Severance and a Separate Trial of Count 1 and was denied. In December 1983, he opposed a government motion for a continuance and again in February 1984. Petitioner filed motions for a Speedy Trial of Count 1 or dismissal in February 1984, June 1984 and again in October 1984 and was denied each time, although the Petitioner is the only defendant not charged with a substantive violation and the only defendant who did not waive his right to a speedy trial.

More than two years have elapsed since the indictment and the case is still delayed by the government's efforts to secure evidence from Switzerland and the defense's efforts to gain discovery from Mexico and Europe. None of this evidence pertains to the prosecution of Count 1, conspiracy. The quest for discovery of exculpatory evidence from Pemex has been frustrated by Pemex's failure to produce certain key documents specified in a subpoena. The situation has been exacerbated by the Pemex civil suit against many of the same defendants in the criminal case; i.e., the production of the documents in the criminal case would severely weaken their civil suit.

The *earliest* possible date for a trial is early February 1985. The trial has been estimated by the government and defense counsel as involving 12-16 weeks, including the selection of a jury.

REASONS FOR GRANTING THE WRIT

Review on Certiorari is merited under Rule 17.1 of the Rules of the Supreme Court. There is a constant need for this Court to review and to supervise situations where the United States through Grand Juries or through lawyers of the Department of Justice knowingly and deliberately abuse its power; i.e., issuance of indictments wherein the FCPA statute is construed in such a way as to render the important Eckhardt Amendment provisions superfluous or insignificant; or a plea bargain with its resultant guilty plea negotiated with a corporate defendant charged with an FCPA violation and the bargain is framed in such a way that the United States describes a corporate employee such as the Petitioner as being a criminal in order to allow the criminally charged corporate criminal to plead falsely to facts which might mitigate penalties imposed by law.

The Fifth Circuit acknowledged that the Petitioner acted only on behalf of and for the benefit of his employer, Harvester, and that he must be prosecuted in this capacity and the Fifth Circuit concluded if it adopted the government's "end-run" maneuver around the Eckhardt Amendment it would render it meaningless. *United States v. McLean* at 5263, 5264.

The Fifth Circuit also acknowledged that the Petitioner was made the scapegoat for unindicted Harvester and left to present a defense in the criminal proceeding without the superior resources of Harvester. The Fifth Circuit also recognized that Harvester would have every incentive to shift as much culpability as possible to the Petitioner, which is precisely what the Eckhardt Amendment is intended to prevent. *United States v. McLean* at 5263.

The Fifth Circuit presented a valid and correct analysis of the facts of the case and the legislative history govern-

ing the intent of Congress in the Eckhardt Amendment, and they properly affirmed the dismissal of the 43 aiding and abetting counts.

The Fifth Circuit fell short in complying with the expressed intent of Congress by not dismissing Count 1 conspiracy and thus keeping the Petitioner in the case defending himself and his employer without the benefit of their resources and knowledge.

There is a possible conflict between the clear intent of the Eckhardt Amendment and the well settled legal concept that a conspiracy to commit an offense and the commission of a substantive offense are separate and distinct crimes. But it is clear that the Fifth Circuit recognized that the FCPA bars the Petitioner's prosecution in his circumstance. The Fifth Circuit avoided settling the conflict by incorrectly urging that the Petitioner's motion to dismiss the conspiracy count was "not properly" before them and incorrectly determining that the denial of an Eckhardt Amendment motion to dismiss is unappealable.

The Petitioner has no recourse to being left in the case without the intended protection of the Eckhardt Amendment but to seek certiorari and review by this Court.

ARGUMENT I

The Petitioner's basic Sixth Amendment Constitutional rights to counsel and to provide witnesses necessary for his defense was intended by Congress to be protected by the Eckhardt Amendment. The government's "end-run" maneuver to use the loophole of a conspiracy charge to invalidate this protection should be disallowed because it would render the protection of the Eckhardt Amendment meaningless.

The Fifth Circuit rejected the Government's argument that the Harvester plea of guilty to conspiracy to violate the FCPA satisfies the act's requirement of a predicate violation by the employer in order to prosecute the Petitioner. The Fifth Circuit in *McLean* reiterated at 5264 the well settled differences between a conspiracy offense and a substantive offense and concluded a conspiracy to commit a violation does not satisfy the clear requirement of the act. 15 U.S.C. § 78ff(c)(3) states, whenever an issuer is found to have violated Section 78dd-1(a) of this title, any employee who willfully violated the provision shall be subject to its penalties.

The Petitioner was colored in the *Harvester* offer of proof as a renegade corporate employee acting as an aider and abettor and conspirator in order to satisfy the urgings of a situation of respondeat superior, while in the *Crawford* case he is charged as acting as an individual (domestic concern), while aiding and abetting and conspiring with CEI and others. Under the circumstances the *Harvester* guilty plea has no value as a predicate for any application in the *Crawford* case when considering the fact Harvester urged respondeat superior at the time of their plea but more recently since the filing of the $135,000,000 civil suit

by Pemex against Harvester and others they have disavowed their guilty plea.

The fact was well established by the Fifth Circuit that a major objective of the Eckhardt Amendment is to allow the employee the superior resources and knowledge of the company and to prevent the employer from making the employee its scapegoat. *United States v. McLean* at 5263.

The Fifth Circuit's decision to avoid ruling on the dismissal of count 1 leaves the Petitioner with a possible 5-year sentence if he is convicted of conspiring to violate the FCPA. It is of little consequence to the Petitioner whether he serves 5 years for conspiracy or 5 years for a substantive violation such as aiding or abetting or whether he suffers the stress and costs of a 3-month trial for conspiracy or for a substantive violation, without the aid of counsel. (The Petitioner's motions for Court appointed counsel have been denied and he refuses to waive this right.) Harvester obviously never faced the possibility of jail and in their plea bargain; they "protected" their one officer who was a target in the investigation and named as a co-conspirator in the *Crawford* case.

The charge of conspiracy is simply a different form of the derivative liability, aiding and abetting, that is barred from prosecution in the case of the Petitioner. The ability to convict the Petitioner of conspiracy to violate the FCPA where he cannot be tried for an aiding and abetting violation of the FCPA would constitute an "end-run" around the Eckhardt Amendment that would render it meaningless. *United States v. McLean* at 5264.

ARGUMENT II

A defense based on the Eckhard amendment is a claim that may be properly appealed by a defendant prior to trial. It is well established that defendants may appeal the denial of "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States v. MacDonald* at 860.

In *Cohen v. Beneficial Industrial Loan Corp.*, this Court articulated at 546 that there was a small class of decisions exempted from the final-judgment rule which "finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." This Court summarized the grounds within which the order appealed from qualified as a "final decision" for the purposes of 28 U.S.C. § 1291 in *Abney v. United States* at 658.

Under the *Abney* standard, defenses based on the Double Jeopardy Clause, the Speech and Debate Clause and several other clauses have been held to be appealable before trial. More recently the "serious and unsettled" question of Presidential immunity in *Nixon v. Fitzgerald* was included under this same doctrine.

The *MacDonald* Court noted that, "Certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial. Double Jeopardy claims are paradigmatic." *United States v. Mac Donald* at 860. The defense created by the Eckhardt Amendment, like the Double Jeopardy defense, is certainly paradigmatic and like the several defenses reviewed above, meets

each of the three requisite criteria spelled out in the *Abney* standard and in *Coopers & Lybrand v. Livesay,* at 468.

The Fifth Circuit in urging the unappealability of the Petitioner's claim for dismissal of the conspiracy count, *United States v. McLean* at 5264, cites *United States v. Sisk* at 1180 which in turn refers to *MacDonald, Cohen* and *Abney* all in a manner which support the appealability (inter alia) i.e., the *Sisk* Court notes at 1180, "Under *Cohen,* an order on a pretrial motion is immediately reviewable (inter alia) if the trial court's decision involved rights which would be lost, probably irreparably if review were deferred until after trial. *Id.* at 546." *Sisk* at 1180 does, however note, "a pretrial order denying a defendant's motion to dismiss is *not normally* (emphasis added) an appealable 'final decision' "*but* then goes on to delineate the exceptions under the *Cohen* rule.

The Petitioner's situation satisfies the *Abney* and *Coopers & Lybrand v. Livesay* standard as follows:

> *First.* A defense based on the Eckhardt Amendment conclusively resolves the issue because, like a successful Double Jeopardy claim, it completely concludes the prosecution.
>
> *Second.* As the Fifth Circuit's opinion in *United States v. McLean* illustrates, the application of the Eckhardt Amendment is completely separate from any determination of guilt or innocence.
>
> *Third.* The value of the right conferred by the Eckhardt Amendment would be diminished if a defendant were forced to wait until after trial to seek appellate review. Of course, an invalid conviction could be set aside. But, like the Double Jeopardy Clause, the Eckhardt Amendment protects a defendant from even being tried.

ARGUMENT III

The requirement of a cross-appeal is a rule of practice and is not jurisdictional and may be waived in appropriate circumstances. *Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction Sec. 3904, 415-418 (1976).*

The flexibility inherent in the cross-appeal rule was illustrated by the Fifth Circuit's recent decision in *French v. Estelle.* That case concerned an appeal from a district court decision that had granted a habeas petition brought by a state prisoner. On appeal, the Fifth Circuit found that the petitioner's rights under the Double Jeopardy Clause had been violated. The state argued that the double-jeopardy claim was not properly before the Fifth Circuit because it had not been raised in a cross-appeal and because a decision on that ground modified the district court decision by preventing the state from bringing a new proceeding against the habeas petitioner.

The Fifth Circuit held that a cross-appeal was not a necessary predicate to consideration of the double-jeopardy claim. The Court noted while quoting from *Empire Life Insurance v. Valdak,* at 334 that, "it is well established that, as a matter of discretion, an appellate court could pass upon issues not pressed before it or raised below where the ends of justice will be best served by doing so." *French v. Estelle* at 318. Because, among other things, the petitioner had actually raised the issue in the district court and the petitioner had acted *pro se,* the Fifth Circuit determined in *Estelle v. French* that it could properly decide a double-jeopardy claim. See *Bryant v. Technical Research Company* at 1337, (a cross-appeal is "not a jurisdictional prerequisite once an initial appeal has been filed.")

This case also presents appropriate circumstances in which the requirement of a cross-appeal should be waived. The Petitioner herein has acted *pro se* since shortly after Harvester entered their guilty plea to conspiracy on November 18, 1982 and the Petitioner first filed a motion to dismiss the conspiracy and aiding and abetting counts based on the Eckhardt Amendment and for other reasons on January 14, 1983. At least eight additional supplements were filed in the district court in support of dismissal.

Petitioner McLean acting *pro se* was unaware of any necessity for a formalized cross-appeal when he specifically raised the conspiracy issue in the Fifth Circuit and motioned for its dismissal as part of his Appellees brief.

The Government initiated the appeal of the district court's decision which mandated the Fifth Circuit's detailed scrutiny of all aspects of the Eckhardt Amendment. *United States v. McLean* at 5261. This scrutiny should include the application of the Eckhardt Amendment to the Conspiracy Count.

CONCLUSION

1. The Government created the situations in the prosecution of Harvester and the Petitioner which mandate the application of the Eckhardt Amendment to bar the Petitioner's prosecution.

2. The record of the case shows and the Fifth Circuit has acknowledged that the Petitioner was set-up as Harvester's scapegoat and left to defend himself and unindicted Harvester in the *Crawford* case, but without the resources of Harvester.

3. Count 1, conspiracy, as charged against the Petitioner, is an "end-run" around the Eckhardt Amendment

by the Government, intended to render its protection meaningless.

4. It is the intention of the Eckhardt Amendment to protect the Petitioner's rights to counsel and to provide witnesses for his defense as well as protecting him from being made a scapegoat.

5. An Eckhardt claim for dismissal on appeal is similar to a double jeopardy claim in that both meet the *Abney* qualifications for purposes of 28 U.S.C. § 1291.

6. The Petitioner's urging for dismissal of Count 1 was properly before the Fifth Circuit.

The Petitioner respectfully asks the Court to issue its Writ of Certiorari.

Respectfully submitted,

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November 16, 1984

APPENDIX

A. *United States v. McLean*, ____ F.2d ____ (5th Cir, Aug. 10, 1984) (Slip Op. 5258.) 1a

B. Denial of Petition for Rehearing, dated Sept. 19, 1984. ..... 16a

C. District Court Order and Memorandum Dismissing 43 Aiding and Abetting Counts but Denying Dismissal of the Conspiracy Count, June 24, 1983. ..... 17a

D. Constitution of the United States, Sixth Amendment 19a

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,
v.
George S. MCLEAN, Defendant-Appellee.

No. 83-2452.

United States Court of Appeals,
Fifth Circuit.

Aug. 10, 1984.

Defendant moved to dismiss charges pending against him under Foreign Corrupt Practices Act. The United States District Court for the Southern District of Texas, George E. Cire, J., dismissed substantive counts, but denied motion to dismiss conspiracy charge, and the Government appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that prosecution of defendant was barred due to Government's failure to convict defendant's employer under the Act, and due to fact that, under plea agreement, Government would be unable to indict employer and try employer with defendant.

Affirmed.

1. Bribery 1(2)

In prosecution of employee for violation of Foreign Corrupt Practices Act, Government could not satisfy requisite of showing that issuer, the employer, was "found to have violated" provision of the Act making it unlawful to use mails or instrumentalities of interstate commerce to bribe foreign officials by showing in employee's trial as an

element of his offense that his employer, who was unindicted, violated that Act.

Foreign Corrupt Practices Act, § 101 et seq., 91 Stat. 1494; Securities Exchange Act of 1934, § 32, as amended, 15 U.S.C.A. § 78ff.

2. Criminal Law 59(5)

Absent an express provision to the contrary, aiding and abetting is included as an offense of every federal crime.

3. Bribery 3

Under Foreign Corrupt Practices Act, employee of issuer who acted as employee had to be prosecuted in that capacity, and could not be prosecuted in his individual capacity as a domestic concern.

Foreign Corrupt Practices Act, § 101 et seq., 91 Stat. 1494.

4. Bribery 1(2)

In prosecution of employee for violation of Foreign Corrupt Practices Act, requirement of predicate violation by employer was not satisfied by employer's plea of guilty to conspiracy to violate the Act.

Foreign Corrupt Practices Act, § 101 et seq., 91 Stat. 1494.

5. Conspiracy 28(2)

Conspiracy to commit an offense and commission of a substantive offense are separate and distinct crimes.

6. Bribery 3

Prosecution of employee under Foreign Corrupt Practices Act for acts committed for benefit of employer was barred where government had failed to convict the employer of substantive offense and where, under plea agreement under which employer pleaded guilty to charge of conspiracy to violate the Act, Government would be unable to indict employer and try employer with employee.

Foreign Corrupt Practices Act, § 101 et seq., 91 Stat., 1494.

7. Criminal Law 1024(2)

Denial of motion to dismiss an indictment is not ordinarily a "final decision" for purposes of statute governing jurisdiction of appeals from final decisions of district courts, and is therefore unappealable. 28 U.S.C.A. § 1291.

Appeal from the United States District Court for the Southern District of Texas.

Before JOHNSON, HIGGINBOTHAM, and DAVIS, Circuit judges.

W. EUGENE DAVIS, Circuit Judge:

We are presented for the first time with the question of whether the Foreign Corrupt Practices Act (FCPA) permits the prosecution of an employee for a substantive offense under the Act if his employer has not and cannot be convicted of similarly violating the FCPA. We conclude that the Act prohibits such a prosecution and affirm the district court.

I.

During the late 1970's Petroleos Mexicanos (Pemex), the national petroleum company of Mexico, purchased large quantities of turbine compressor equipment to capture and pump to processing plants a high volume of natural gas. The Solar division of International Harvester Company (Harvester) was the dominant worldwide supplier of such equipment. George S. McLean was its vice-president and Luis A. Uriarte was its Latin American regional manager; both were Harvester employees. Crawford Enterprises, Inc., (CEI) was a broker and lessor of gas compression systems which frequently purchased equipment from Harvester for resale or lease. Harvester, as prime contractor, had supplied Pemex with equipment in the mid-Seventies; during the period of accelerated development in the late 1970's, however, Harvester acted

as a subcontractor for CEI, which had contracted with Pemex to build complete compression plants.

In early 1979, the United States initiated grand jury investigations into allegations that American businessmen had bribed Mexican officials in violation of the FCPA. On October 22, 1982, a forty-nine count indictment was returned in federal district court charging CEI and nine individuals, including McLean and Uriarte, with one conspiracy count to use interstate or foreign instrumentalities for the purpose of bribing Pemex officials in violation of 18 U.S.C. § 371 (1966), forty-seven substantive counts in violation of the FCPA, 15 U.S.C. §§ 78dd-2(a)(1) and (3), § 78dd-2(b) (1981), and one obstruction of justice count in violation of 18 U.S.C. § 1503 (1966).[1] McLean and Uri-

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[1] 15 U.S.C. § 78dd-2 provides, in relevant part:

(a) It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to –

(1) any foreign official for purposes of –

(A) influencing any act or decision of such foreign official capacity, including a decision to fail to perform his official functions; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

arte were named in the single conspiracy count and in forty-three substantive counts of aiding and abetting CEI in violating FCPA and 18 U.S.C. § 2 (1969). Although McLean and Uriarte's employer, Harvester, was not charged in the forty-nine count indictment, the government concedes that all acts of McLean and Uriarte were committed within the scope of their employment with Harvester.

The indictment charges the defendants with participating in a plan to bribe Pemex officials in order to sell turbine compression equipment to Pemex.

On November 17, 1982, Harvester entered a guilty plea to a one count bill of information charging conspiracy to violate the FCPA. In the plea agreement with Harvester, the government agreed to bring no further charges against Harvester arising out of its sales to CEI and Pemex. McLean was named but not charged as a co-conspirator

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(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of –

(A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

with Harvester in that proceeding. The bill of information filed against Harvester included eleven of the twelve overt acts alleged against Harvester or its employees in the forty-nine count indictment charging McLean and Uriarte with conspiracy to violate the Act.

Both McLean and Uriarte filed motions to dismiss the charges pending against them on grounds that the failure of the government to convict Harvester of a violation under the FCPA barred their prosecution. The district court dismissed the substantive counts, but denied the motion to dismiss the conspiracy charge. The court concluded that the Eckhardt Amendment, 15 U.S.C. § 78ff[2], permits the conviction of an employee under the FCPA. The district court concluded that since Harvester's plea of guilty to conspiracy was not a substantive FCPA violation, McLean and Uriarte could not be prosecuted for the substantive counts.

The government presents three arguments on appeal: (1) the "found to have violated" provision does not require that the employer be convicted of a FCPA violation; this requirement may be satisfied by establishing in the employee's trial that the employer violated the Act; (2) McLean, as an individual domestic concern, may be

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[2]Section 78ff U.S.C. 15 provides in pertinent part:

> (c)(3) Whenever an issuer is found to have violated section 78dd-1(a) of this title, any employee or agent of such issuer who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder of such issuer), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years or both.

charged with aiding and abetting CEI and; (3) International Harvester's conviction of conspiracy satisfies the "found to have violated" requirement.[3]

II.

Our task in interpreting the FCPA 'is to construe the language so as to give effect to the intent of Congress." *United States v. Am. Trucking Ass'ns,* 310 U.S. 534, 542, 60 S.Ct. 1059, 1063, 84 L.Ed.2d 1345 (1940). To do so, we look primarily to the language of the statute and secondarily to its legislative history, which includes "the purpose the original enactment served, the discussion of statutory meaning in committee reports, the effect of amendments – whether accepted or rejected – and the remarks in debate preceding passage." *Rogers v. Frito-Lay, Inc.,* 611 F.2d 1074, 1080 (5th Cir.), *cert. denied,* 449 U.S. 889, 101 S.Ct., 246, 66 L.Ed.2d 115 (1980).

The substantive violations of the Act are established in two sections. Section 78dd-1 makes it unlawful for an issuer (defined as an entity subject to the securities registration requirements of § 78*l* and 78*o* of Title 15), its officers, directors, employees or agents, to use the mails or other instrumentality of interstate commerce to bribe foreign officials for various pruposes including to obtain business. Section 78dd-2 provides generally the same prohibition for a domestic concern, its officers, directors, shareholders and employees. Domestic concern is broadly defined to include any United States citizen, national or resident; or any corporation (other than an issuer), part-

[3]The government dismissed its indictment against Uriarte in late 1983 after Uriarte pled guilty to a one-count information charging him as an accessory after the fact on one of the FCPA violations.

nership or other entity subject to United States jurisdiction and control.

Section 78ff(c)(3) provides the penalties applicable to employees of issuers. That provision provides in part that: "whenever an issuer is found to have violated section 78dd-1(a) of this title, any employee or agent of such issuer who is a United States citizen, national or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director or stockholder of such issuer), and who willfully carried out the act or practice constituting such violation shall, upon conviction," be subject to fine and/or imprisonment. Section 78dd-2(b)(1)(B)(3) contains a similar provision for the employees and agents of a domestic concern. These two sections with the "found to have violated" prerequisite are collectively referred to as the Eckhardt Amendment, after former Congressman Bob Eckhardt, the leading proponent of the provision.

Hearings were conducted on the precurser to the final version of the Eckhardt Amendment in April of 1977 by the subcommittee of the House Interstate and Foreign Commerce Committee. The subcommittee examined two proposed bills: (1) H.R. 3815, introduced by Congressman Bob Eckhardt, which imposed as a prerequisite to the conviction of an employee a showing of violation of the Act by the issuer or domestic concern, and (2) H.R. 1602 which had no such requirement.

At the hearing, Congressman Eckhardt, the subcommittee chairman, in discussing H.R. 3815 with Harold M. Williams, Chairman of the Securities and Exchange Commission (SEC) and Harvey L. Pitt, general counsel of the SEC stated:

"Indeed, the corporations [sic] interests might

> even be in conflict with that of the agent. The corporation might desire to have Joe Bloke found to have intentionally engaged in bribery and to have been the sole moving agent, that is, the company never agreed to it and the quicker they can convict Joe Bloke, the better off the company is. It is relieved of responsibility and it has a sacrificial lamb in Rome and everybody forgets about the activity.[4]

Congressman Eckhardt pointed out the dependence of the agent on the corporation for an adequate defense since the corporation, due to its superior resources, would be in a much better position than the employer to defend against accusations of wrongdoing in a foreign country.[5] He articulated concern over legislation that would require the agent alone to bear the burden of refuting allegations of FCPA violations. He was also troubled about giving the uncharged corporate employer incentive to both disavow knowledge of the agent's activity and to let the agent bear all responsibility for the wrongdoing.

This problem was avoided, as Pitt explained, because what would become the Eckhardt Amendment "would require the government . . . . to prove in the first instance that the issuer had violated the section, because that is the condition precedent to the holding of any agent responsi-

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[4]**Unlawful Corporate Payments Act of 1977; Hearings on H.R. 3815 and H.R. 1602 before the Subcomm. on Consumer Protection and Finance**, 95th Cong., 1st Sess. 229 (1977) (statement of Bob Eckhardt, subcommittee chairman).

[5]*Id.*

ble."[6] He noted that if there was doubt about the employer's violation of the Act, then the employee could not be held liable.[7] Pitt added that "[B]ecause of the conditional predicate . . . . the issuer and the agent have a community of interest; that is, the agent would be protected by the issuer in at least those cases where the issuer chooses to contest the violation."[8]

Pitt also suggested that employees of issuers be grouped with agents instead of officers, directors and stockholders because the concerns voiced by Eckhardt about agents applied equally to employees; this suggestion was ultimately adopted. H.R. Rep. No. 831, 95th Cong., 1st Sess. 13, reprinted in 1977 U.S.CODE CONG. & AD.NEWS 4098, 4121, 4125.

The report accompanying H.R. 3815 explained its salient features as follows:

> The bill specifically provides that an agent of an issuer, as distinguished from an officer, director or other person in a policymaker position, shall not be subject to the penalties of the bill until it is shown in a separate proceeding or in the proceeding against such agent that the issuer itself was in violation of the provisions of the bill. This provision reflects the Committee's con-

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[6] **Unlawful Corporate Payments Act of 1977: Hearings on H.R. 3815 and H.R. 1602 before the Subcommittee on Consumer Protection and Finance**, 95th Cong., 1st Sess. 231 (1977) (statement of Harvey L. Pitt, general counsel of SEC).

[7] *Id.*

[8] *Id.* Pitt also stated that protection of the Eckhardt Amendment would not extend to "an agent who had run amuck and was not acting pursuant to corporate order," that is, a renegade employee.

> cern that in some instances a low level employee or agent of the corporation – perhaps the person who is designated to make the payment – might other wise [sic] be made the scapegoat for the corporation. The essential elements of these prosecutions will presumably take place on foreign soil. Such an agent or employee unlike the corporation possibly would not have the resources, legal or financial, to provide witnesses necessary to his defense. Accordingly, the practical effect of sections 2(c)(2) and 3(c)(2) is to require the corporation to bring in witnesses to rebut the contention of its involvement. These witnesses would then be available to the agent in his defense.
>
> H.R.Rep. No. 640 95th Cong., 1st Sess. 11 (1977).

The final bill retained the "found to have violated" language of H.R. 3815. This predicate for liability, the Conference Committee stated, would "provide additional protection for agents and employees." H.R.Rep. No. 831, 95th Cong., 1st Sess. 13, reprinted in 1977 U.S.CODE CONG. & AD.NEWS 4121, 4125.

Thus, both the language of the Act and its legislative history reveal a clear intent to impose criminal sanctions against the employee who acts at the behest of and for the benefit of his employer only where his employer has been convicted of similar FCPA violations.

(A)

[1] We therefore reject the government's contention that it may satisfy the predicate required by the Eckhardt Amendment by showing in McLean's trial as an element of

McLean's offense that McLean's employer violated the Act. A major objective of the Eckhardt Amendment is to allow the employee the benefit of the superior resources of the corporation in presenting a defense in the criminal proceeding; a closely related objective is to prevent the employer from making its employee a scapegoat. To permit the government to prosecute McLean and attempt to make a case against unindicted Harvester at McLean's trial places McLean in the undesirable position of defending not only himself, but also his employer – without the benefit of the employer's resources and knowledge. Harvester would have no incentive to assist McLean in his defense; in fact Harvester would have every incentive to shift as much culpability as possible to McLean. This is precisely what the Eckhardt Amendment is intended to prevent.

(B)

[2,3] The government asserts, however, that it may prosecute McLean for aiding and abetting CEI,[9] not as an employee of Harvester, but in his individual capacity as a domestic concern. The government does not contend that McLean was a "renegade employee". To the contrary, it concedes McLean acted only on behalf of and

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[9]The legislative history indicates that aiding and abetting charges may be brought under the Act. ("The concepts of aiding and abetting and joint participation would apply to a violation under this bill . . . ") H.R.Rep. No. 640, 95th Cong., 1st Sess. 8 Indeed, absent an express provision to the contrary, aiding and abetting is included as an offense of every federal crime. *See United States v. Ruffin,* 613 F.2d 408, 421 (2d Cir. 1979) (Wyatt, J. dissenting), *United States v. Standefer,* 610 F.2d 1076, 1081 (3d Cir. 1979), *aff'd.*, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980).

for the benefit of his employer, Harvester. It is a basic canon of statutory construction that "a statute should not be construed in such a way as to render certain provisions superfluous or insignificant." *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 970-71 (5th Cir. 1981).

We conclude that under the statutory scheme, where McLean acted as an employee of an issuer he must be prosecuted in this capacity. Otherwise, the Eckhardt Amendment would be entirely eviscerated. If we adopt the government's position, the government could prosecute employees of Harvester with aiding and abetting CEI and prosecute employees of CEI with aiding and abetting Harvester without indicting either Harvester or CEI. This "end run" maneuver around the Eckhardt Amendment would render it meaningless and we therefore reject the government's argument.

(C)

[4,5] The government also argues that Harvester's plea of guilty to conspiracy to violate the FCPA satisfies the Act's requirement of a predicate violation by the employer. We disagree. The Act requires a finding that the employer "violate[d] section 78dd-1(a)" of the Act. It is well-settled that a conspiracy to commit an offense and the commission of a substantive offense are separate and distinct crimes. *Iannelli v. United States*, 420 U.S. 770, 777, 95 S.Ct. 1284, 1288, 43 L.Ed.2d 616, 622 (1975), *U.S. v. Romeros*, 600 F.2d 1104, 1105 (5th Cir. 1979), *cert. denied*, 444 U.S. 1077, 100 S.Ct. 1025, 62 L.Ed.2d 759 (1980), *U.S. v. Ragano*, 520 F.2d 1191 (5th Cir. 1975), *cert. denied*, 427 U.S. 905, 96 S.Ct. 3192, 49 L.Ed.2d 1199 (1976). Thus, a conspiracy to commit a violation does not satisfy the clear requirement of the Act.

III

[6, 7] We hold that in order to convict an employee under the FCPA for acts committed for the benefit of his employer, the government must first convict the employer. Because the government failed to convict Harvester and under the plea agreement will be unable to indict Harvester and try it with McLean, the Act bars McLean's prosecution.[10]

AFFIRMED.

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[10]McLean urges us to invoke "our equitable powers" and dismiss the conspiracy count still pending against him. Since McLean has not filed a cross-appeal, this issue is not properly before us. In addition, a denial of a motion to dismiss an indictment is not ordinarily a final decision for purposes of 28 U.S.C. § 1291 (1976) and is therefore unappealable. *See United States v. Sisk*, 629 F.2d 1174, 1180 (6th Cir. 1980, *cert denied*, 449 U.S. 1084, 101 S.Ct. 871, 66 L.Ed.2d 809 (1981); *Abney v. U.S.*, 431 U.S. 651, 662-63, 97 S.Ct. 2034, 2041-42, 52 L.Ed.2d 651 (1977); *U.S. v. Rey*, 641 F.2d 222, 224 (5th Cir. 1981).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2452

U.S. COURT OF APPEALS
FILED
SEPT 19 1982
GILBERT F. GANUCHEAU
CLERK

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

GEORGE S. MCLEAN,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING
(September 19, 1984)

Before JOHNSON, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied

ENTERED FOR THE COURT:

United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	C.A. No.
	)	
CRAWFORD ENTERPRISES, ET AL.	)	

CLERK, U.S. DISTRICT COURT,
SOUTHERN DISTRICT OF TEXAS
FILED 254
JUN 24 1983
JESSE E. CLARK, CLERK
BY DEPUTY:
B. VAN BLACK

MEMORANDUM AND ORDER

Came to be heard the motions of Defendants McLean and Uriarte to dismiss the indictment. Uriarte has moved for dismissal based on the Eckhardt Amendment, 15 U.S.C. §§ 78dd-2(b)(3), 78ff(c)(3). McLean has moved for dismissal based on the Eckhardt amendment, grand jury misconduct, and prosecutorial misconduct. McLean and Uriarte are indicted in Count 1 for conspiracy to violate the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-2, in violation of 18 U.S.C § 371. They are indicted in Counts 4-24 and 27-48 for aiding and abetting the other Defendants to violate the FCPA in violation of 18 U.S.C. § 2 and 15 U.S.C. §§ 78dd-2(a)(1) and (3), 78dd-2(b).

The Eckhardt amendment states that whenever an employer has been found to have violated the FCPA, then any of its employees or agents may be convicted of violating the FCPA. Both Uriarte and McLean were employees of International Harvester Company during all times material to the offenses charged in the indictment. International Harvester Company plead guilty to con-

spiracy to violate the FCPA, in violation of 18 U.S.C. § 371, in the United States District Court, Southern District of Texas, Houston Division, Criminal No. H-82-244. Conspiracy and the related substantive offense which is the object of the conspiracy are separate and distinct crimes. *Ianelli v. United States*, 420 U.S. 770, 777-78 (1975); *United States v. Romeros,* 600 F.2d 1104, 1105 (5th Cir. 1979), *cert. denied,* 444 U.S. 1077 (1980); *United States v. Ragano*, 520 F.2d 1191, 1198 (5th Cir. 1975), *cert. denied,* 427 U.S. 905 (1976). Since International Harvester Company plead guilty to conspiracy and not to a substantive FCPA violation, it has not been found to have violated the FCPA. The Eckhardt amendment protects employees like McLean and Uriarte from prosecution under the FCPA when their employer has not been found to have violated the FCPA.

Accordingly, it is ORDERED that Defendants McLean and Uriarte's motions to dismiss the indictment are GRANTED in part and Count 4-24 and 27-48 are dismissed against McLean and Uriarte and that Defendants McLean and Uriarte's motions to dismiss the indictment are DENIED in all other respects.

SIGNED and ENTERED this 24th day of June 1983.

GEORGE E. CIRE
UNITED STATES DISTRICT JUDGE

TRUE COPY I CERTIFY
ATTEST:
JESSE E. CLARK, Clerk

By _____ Deputy Clerk

APPENDIX D

U.S. CONST., amend. VI
AMENDMENT VI – JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX E

SUPREME COURT RULES

PART V. JURISDICTION ON WRIT OF CERTIORARI

Rule 17. Considerations governing a review on certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter, or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * *

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been but should be settled, settled by this Court, or had decided a federal question in a way in conflict with applicable decisions of this Court.

APPENDIX F

Rule 20. Review on Certiorari — time for petitioning.

1. A petition for writ on certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A Justice of this Court, for good causes shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days.

APPENDIX G

28 U.S.C. Section 1254(1):

SECTION 1254, COURT OF APPEALS: CERTIORARI: APPEAL: CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

APPENDIX H

28 U.S.C. Section 1291 (1976).

Final decisions of district courts. The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

APPENDIX I

FOREIGN CORRUPT PRACTICES ACT

15 U.S.C. § 78dd-1. Foreign corrupt practices by issuers

(a) It shall be unlawful for any issuer which has a class of authorities registered pursuant to section 78L of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

* * *

(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or

indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

15 U.S.C. § 78dd-2. Foreign corrupt practices by domestic concerns

(a) It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, give, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

* * *

(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b)(1)(A) Except as provided in subparagraph (B), any domestic concern which violates subsection (a) of this section shall, upon conviction, be fined not more than $1,000,000.

(B) Any individual who is a domestic concern and who willfully violates subsection (a) of this section shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(2) Any officer or director of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (1) of this section shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(3) Whenever a domestic concern is found to have violated subsection (a) of this section, any employee or agent of such domestic concern who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder acting on behalf of such domestic concern), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, stockholder, employee, or agent of a domestic concern, such fine shall not be paid, directly or indirectly, by such domestic concern.

(d) As used in this section:

(1) The term "domestic concern" means (A) any individuial who is a citizen, national, or resident of the United States; or (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organi-

zation, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

15 U.S.C. § 78ff(c) Penalties

(c)(1) Any issuer which violates section 78dd-1(a) of this title shall, upon conviction, be fined not more than $1,000,000.

(2) Any officer or director of an issuer, or any stockholder acting on behalf of such issuer, who willfully violates section 78dd-1(a) of this title shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(3) Whenever an issuer is found to have violated section 78dd-1(a) of this title, any employee or agent of such issuer who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder of such issuer), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, stockholder, employee, or agent of an issuer, such fine shall not be paid, directly or indirectly, by such issuer.

APPENDIX J

18 U.S.C. § 371, CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD THE UNITED STATES

If two or more persons conspire to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner and for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

APPENDIX K

18 U.S.C. § 3, ACCESSORY AFTER THE FACT

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial, or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years.

APPENDIX L

95TH CONGRESS 1st Session | HOUSE OF REPRESENTATIVES | Report No. 95-640

UNLAWFUL CORPORATE PAYMENTS ACT OF 1977

Mr. Staggers from the Committee on Interstate and Foreign Commerce submitted the following

REPORT
together with
MINORITY VIEWS

* * *

Liability of agents

The bill specifically provides that an agent of an issuer, as distinguished from an officer, director or other person in a policymaking position, shall not be subject to the penalties of the bill until it is shown in a separate proceeding or in the proceeding against such agent that the issuer itself was in violation of the provisions of the bill. This provision reflects the Committee's concern that in some instances a low level employee or agent of the corporation — perhaps the person who is designated to make the payment — might otherwise be made the scapegoat for the corporation. The essential elements of these prosecutions will presumably take place on foreign soil. Such an agent or employee unlike the corporation possibly would not have the resources, legal or financial, to provide witnesses necessary to his defense. Accordingly, the practical effect of sections 2(c)(2) and 3(c)(2) is to require the corporation to bring in witnesses to rebut the contention of its involvement. These witnesses would then be available to the agent in his defense.

(page 11)

APPENDIX M

HOUSE CONFERENCE REPORT NO. 95-831

* * * * * * * *

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

* * *

2. Penalties — The Senate bill provided fines of not more than $500,000 for willful violations by issuers and penalties of up to $10,000 and/or 5 years imprisonment for willful violations by any officer, director, employee or shareholder thereof.

The House amendment provided a fine of not more than $1 million for knowing and willful violations by an issuer. Penalties for knowing and willful violations by officers, directors, agents, or natural persons in control of any issuer were similar to those provided in the Senate bill. However, an agent's liability was predicated upon a finding that the issuer violated the section. Finally, the House amendment prohibited an issuer from paying either directly or indirectly any fine imposed under this section upon any officer, director, agent or natural person in control of such issuer.

The conference substitute adopts the maximum corporate penalty in the House amendment and the penalties applicable to officers, directors, employees, and stockholders acting on behalf of the issuer as provided in the Senate bill. The conference substitute incorporates the "agent" provisions of the House amendment. To provide additional protection for agents and employees, the conference substitute predicates an employee's or agent's liability upon a finding that the issuer has violated the section. As in the House amendment, the conference

substitute prohibits an issuer from paying, either directly or indirectly, any fine imposed upon any indivdual under this section.

(pages 12 and 13)

APPENDIX N

UNLAWFUL CORPORATE PAYMENTS ACT OF 1977

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CONSUMER PROTECTION
AND FINANCE
OF THE
U.S. CONGRESS HOUSE COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES
NINETY-FIFTH CONGRESS

FIRST SESSION

ON

H.R. 3815 AND H.R. 1602
APRIL 20 AND 21, 1977

Serial No. 95-11

Mr. Eckhardt. I would like to take up a matter with you that you really didn't take up in your testimony. Frankly, in a bill as complex as this, I have no pride of authorship. As a matter of fact, all these bills stem from many authors over a considerable period of time and the purpose of hearings like this is to throw the bill's content out for the constructive criticism of all persons who may be involved in it. Therefore, I take the liberty of criticizing the bill myself on one point and asking your opinion on it.

One thing that has come to concern me is the provision on page 4 providing that it is illegal for any agent of such

issuer who knowingly and willfully carried out the practice to engage in it. I don't have any compunctions against making acts of foreign bribery illegal for the corporation. Of course, in order to prove the criminal activity, one would have to show not only that the act of bribery occurred overseas, which would be an act which would be almost totally subject to proof in a place far away from the court that made the determination, but another necessary link in the criminal chain would be the showing that some kind of official order was issued to engage in such bribery. In other words, the Defendant would always be able to marshal what evidence there was to contradict any contention that the company had anything to do with the bribery. With respect to that necessary element of the case without which a conviction could not be had, the defendant would be peculiarly in control of the evidence, both overseas evidence and domestic evidence. But this is not so with respect to the individual who is an agent of such issuer and who is being accused of an act overseas where the totality of the proof would be from activities overseas. Indeed, the corporations interest might even be in conflict with that of the agent. The corporation might desire to have Joe Bloke found to have intentionally engaged in bribery and to have been the sole moving agent, that is, the company never agreed to it and the quicker they can convict Joe Bloke, the better off the company is. It is relieved of responsibility and it has sacrificial lamb in Rome and everybody forgets about the activity. Also, there may be persons on the other side of the bribery picture. For instance, officials of Italy who might like to establish that Joe Bloke did in fact bribe a lower official and that this was not authorized and in that way remove the matter from political concern.

It does concern me a little that compulsory process is somewhat difficult when all of the facts that could be mar-

shaled for the defense must be obtained from a place perhaps halfway around the world. I don't find any difficulty whatsoever with the corporation's position as a defendant because indeed it has a very inside road to testimony and information. For instance, with respect to what transpired within the corporation itself, it has the records in hand, and indeed as has been said by Secretary Blumenthal, the proof of these matters without cooperation from a foreign government might be difficult. At any rate, it seems to me that there is a vast difference between the position of the individual defendant accused of having violated the act and the corporate defendant. Besides, the individual defendant can be clapped in jail and the corporation can't be clapped in jail.

(pages 228, 229)

• • •

Mr. Eckhardt. I am not suggesting that it be left out. Actually, there are three levels of responsibility. First is the level on the corporation. The corporation could be fined up to $1 million in this case. Second, any officer, director, or employee of such issuer or any natural person in control of such issuer, who knowingly and willfully ordered, authorized, or acquiesced in the act or practice constituting such violation would be subject to the penalty. I would not eliminate that. The third is any agent of such issuer who knowingly and willfully engaged in the act. The agent is different from the other two. I guess he could say, "I was out of my mind when I did it and I did not direct myself to do it." But he is not in a position to bring evidence in to defend himself other than evidence which must be gotten in a foreign country. In the other two cases the evidence is either evidence that is available from the records or through the processes of the corporation in the

United States or is readily available to them overseas because they are regularly doing business there. But the agent may have been back a year or so and then may be prosecuted. He would then be called upon to prove that the act did not occur.

It would be much more difficult for him, it seems to me, to defend than either the corporate individual or the responsible corporate authority or the corporation itself. They are saying, it happened, yes, it may have happend and it may have been admitted to happen, but we had nothing to do with it. As a matter of fact, it was that irresponsible person that we improvidently sent to Rome that caused this difficulty.

(pages 230, 231)

* * *

Mr. Pitt. I see the problem. I think it is a real one. I am not advocating a position one way or the other, but one other point that should be made: because of the conditional predicate — that the issuer itself be proved to have violated the act and to have made an unlawful payment under it — that, insofar as foreign acts are involved, the issuer and the agent have a community of interest; that is, the agent would be protected by the issuer in at least those cases where the issuer chooses to contest the violation.

Mr. Eckhardt. That is very important.

Mr. Pitt. That is important because the issuer might, in some cases, choose not to contest, not necessarily because it believed it had violated the law, but because it was easier to plead to a violation than to subject itself to the rigors of a trial.

Assuming that there were allegations against an agent, and the issuer did contest the allegations against it, I think

the agent would be placed in the position of disproving — not what acts the issuer authorized — but only disproving what charges might be raised against him as to what his understanding was. In all instances, the burden would be to the government, it seems to me, to prove that conduct in violation of the act did occur, and the agent would not be compelled to bear the very difficult burden of proving that an act did not occur.

Mr. Eckhardt. Of course, that is true. There is no question about that. But the thing about it is that the government would undoubtedly have both the resources and the ability to bring in witnesses from overseas whereas the individual would have a very difficult time bringing in witnesses to rebut such testimony. Of court, there is a reason why we left that in. You will note the sanction is a $10,000 fine and/or 5 years imprisonment which is relatively light for foreign bribery. I disliked it very much for that reason. I thought it was almost an invitation to use an individual as a scapegoat because it is so cheap to let him pay. So what we did was make a $1 million penalty applicable to the corporation itself and for individuals only a $10,000 penalty. We did that intentionally. We did it partially because we felt that it might be necessary to let the individual engage in plea bargaining and immunity in order to get testimony and in order to convict the corporation. Thus, it is rather important to keep the individual in as an enforcement technique. But I simply would not like to see a situation where we place such a heavy burden on an individual that we effectively deny him what is considered ordinary due process of law in this country.We might consider, for instance, removing the imprisonment provision. We might also consider some specific provisions with respect to process. In other words, if the government obtains process, the individual shall be af-

forded the same opportunity, even if it is at prosecutorial expense.

(pages 231, 232)

* * *

Mr. Pitt. Without intending to prolong this discussion, if I might I would like to make additional points.

One possibility which occurs to me might be to strengthen the conditional predicate which would effectively prohibit a prosecution or at least incarceration of an agent if there was not a full trial and proof of the issuer's violation. The agent would be able to avail himself of the fact that the issuer had to prove that the payment iself did not fall within the act.

Presumably, if the issuer is compelled to litigate that issue in a criminal proceeding with its rigorous standards of proof, and if the issuer fails on that, I think there should be less sympathy for an agent in that context. The issue would turn, in the agent's case, to information which the agent had in his control, what his written or oral instructions were, what he did overseas, and how he facilitated the violation. There are elements he could draw upon and would have proof of in terms of his own conduct.

The second point is that, in your concern about agents, I think you should also consider the employees of issuers, because the term "employee" is a very inclusive term. At some juncture some of the concerns that you raised about agents, even though they would not apply to officers and directors, could apply to lower level employees who might also claim that they were asked to do something and did not quite understand what it was they were doing, but nevertheless are now charged with criminal conduct.

(page 232)

APPENDIX O

§ 3904. — Cross-Appeals

A final limitation on court of appeals action is found in rules requiring that ordinarily, in order to secure modification of a judgment, an appellee may not rely on the original appeal, but must cross-appeal. The same conclusion follows even more easily as to parties who have not participated at all in an appeal.

The classic statement of the basic doctrine is provided by the opinion of Justice Brandeis in United States v. American Railway Express Company:

> It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the right of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.[1]

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[1] **American Railway Express case**
1924, 44 S.Ct. 560, 564, 265 U.S. 425, 435, 68 L.Ed. 1087.

Current statements remain the same. In one recent decision, judgment based on a jury verdict for the defendant was affirmed on the ground that a verdict should have been directed for the defendant, over the plaintiff's argument that this basis for decision was not

Detailed development of this rule, and various exceptions to it, will be provided in the discussion of the Federal Rules of Appellate Procedure.[2] For the moment, the important question is whether the rule is merely a rule of practice, that may be suspended if good reason appears, or whether it imposes a jurisdictional limit that cannot be ignored.

Occasional statements may be found that the absence of a required appeal deprives the court of jurisdiction to con-

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available without a cross-appeal by the defendant. The court responded that "An appellee cannot attack a judgment either to enlarge his rights thereunder or to lessen the rights of his adversary unless he files a cross-appeal.*** However, an appellee may, without filing a cross-appeal, defend a judgment on any ground consistent with the record, even if rejected or ignored in the lower court. Jaffke v. Dunham, 352 U.S. 280, 77 S.Ct. 307, 1 L.Ed.2d 314 (1957); Dandrige v. Williams, 397 U.S. 471, 475, n. 6, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970) * * *. Here appellee does not attack the judgment in its favor rendered below. It merely asserts additional grounds for affirming the judgment. Appellee made the appropriate record in the trial below, and, after appellants' designation of the record on appeal, appellee designated additional parts of the transcript to be included, expressly stating that one of the grounds for supporting the judgment was that appellee was entitled to a directed verdict at the close of all the testimony and that the trial court erred in not directing the same." Tiedeman v. Chicago, Milwaukee, St. P. & Pac. R.R., C.A. 8th, 1975, 513 F.2d 1267, 1272-1273 (per Stephenson, J.).

[2]**Further discussion**

See also Stern, When to Cross-Appeal or Cross-Petition – Certainty or Confusion? 1974, 87 Harv.L.Rev. 763.

sider the questions that should have been so raised,[3] or even that the appellee lacks "standing" to raise questions not framed by cross-appeal.[4] The predominant view, however, is that in appropriate circumstances the requirement

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[3]**Lack of jurisdiction**

Gomez v. Wilson, C.A. 1973, 477 F.2d 411, 414 n. 10, 155 U.S.App.D.C. 242.

On appeal by the defendant from a judgment on the merits in favor of the third-party defendant, it was suggested that the failure of the third-party defendant to file a notice of appeal was "jurisdictional," and deprived the court of power to consider denial of an earlier motion to dismiss the third-party claim as an improper use of Civil Rule 14. Haffa v. U.S., C.A.7th, 1975, 516 F.2d 931, 933 n. 3. Even if it is accepted that a cross-appeal is needed to support a favorable judgment on such alternative grounds, which seems doubtful, the unconsidered reference to jurisdiction should not be given full force.

See also

A petitioner who had won an order in habeas corpus proceedings that he be released from state confinement unless a renewed commitment proceeding were brought within 60 days could not, having dismissed his cross-appeal, raise an attack on the relevant state statutes that, if successful, would result in release without any opportunity for further commitment. U.S. ex rel. Stachulak v. Coughlin, C.A.7th, 1975, 520 F.2d 931. The court noted that the cross-appeal would at least serve the function of providing notice that the appellee was attacking the judgment. 520 F.2d 937, n. 7. It continued that application of the rule might seem technical, but that the rule "must be followed." This conclusion seems particularly suspect in habeas corpus proceedings, since the attack on the statute could be renewed again if confinement were ordered.

But see

Arnold's Hofbrau, Inc. v. George Hyman Constr. Co., C.A.1973, 480 F.2d 1145, 1150, 156 U.S.App.D.C. 253 (written by Judge Winter of the Fourth Circuit).

[4]**Lack of standing**

U.S. ex rel. Goetz Constr. Inc. v. Yorfino, C.A.5th, 1969, 412 F.2d 329, 330.

can be ignored.[5] This view finds some support in Supreme Court practice, and surrounding statements that appear to embrace appeals to courts of appeals.[6]

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[5]**Requirement can be ignored**

United Optical Workers Union Local 408 v. Sterling Optical Co., C.A.2d, 1974, 500 F.2d 220, 224 (dictum).

Chicago, Burlington & Quincy R.R. v. Ready Mixed Concrete Co., C.A.8th, 1973, 487 F.2d 1263, 1268 n.5.

Arnold's Hofbrau, Inc. v. George Hyman Constr. Co., C.A.1973, 480 F.2d 1145, 1150, 156 U.S.App.D.C. 253.

Tug Raven v. Trexler, C.A.4th, 1969, 419 F.2d 536, 548, certiorari denied 90 S.Ct. 1843, 398 U.S. 938, 26 L.Ed.2d 271.

See also

By special verdict, a jury found that an accident was caused by a dangerously defective condition of the automobile involved, and that the driver was negligent in operating it. Judgment was entered for the driver both on his claim against the automobile manufacturer, and also on the manufacturer's claim against the driver for contribution to its liability to the estate of a deceased passenger. The driver was allowed to challenge submission of the negligence issue to the jury without a cross-appeal: "While better practice would have dictated that [the driver] file a protective cross-appeal, in these circumstances we will not allow his failure to file a notice of appeal to preclude our review of the record." Rhoads v. Ford Motor Co., C.A.3d, 1975, 514 F.2d 931, 934. Since the result was affirmance of the judgment below, although on new grounds, the need for cross-appeal seems questionable.

Other cases are cited in notes 7 and 11, below.

[6]**Supreme Court practice**

U.S. v. ITT Continental Baking Co., 1975, 95 S.Ct. 926, 929-930 n. 2, 420 U.S. 223, 226 n. 2, 43 L.Ed.2d 148: "Ordinarily, * * * as a matter of practice and control of our docket, if not of our power, we do not entertain a challenge to a decision on the merits where the only petition for certiorari presents solely a question as to the remedy granted for a liability found to exist, even if the respondent is willing to accept whatever judgment has already been entered against him." (per Brennan, J.).

Langnes v. Green, 1931, 51 S.Ct. 243, 246, 282 U.S. 531, 538, 75 L.Ed.2d 520. The cases dealing with cross-appeals "simply announce a rule of practice which generally has been followed; but none of them deny the *power* of the court the remedy granted for a liability to review objections urged by respondent, although he has not applied for certiorari, if the court deems there is good reason to do so."

It seems better to recognize a power to modify a judgment in favor of a nonappealing party. This view is easiest to justify with respect to matters going to jurisdiction, or any other matters so important that a court is justified in raising them on its own motion.[7] Even with respect to issues raised by an appellee, there may not be a great interest in fostering the appellant's sense of repose in whatever partial victory seems assured by the lack of formal cross-appeal. More important, there seems to be little functional justification for the cross-appeal requirement. Certainly notice of the issues to be raised can be accomplished as effectively by other means, and indeed is more effectively accomplished by later steps even in cases in which a cross-appeal has been taken.[8] If the judgment is so complex as to permit execution of unappealed portions pending appeal of others, there are ample means for preventing the possible difficulties or taking them into account in determining whether to allow non-appeal presentation of the issues. Recognition of a power, finally, need not lead to its profligate use. In one recent opinion, the Court of Appeals for the Second Circuit stated that if an issue were before it, there would be no difficulty in finding error; that the cross-appeal requirement may well be a rule of practice that may be disregarded; but that there was no

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[7]**Matters raised sua sponte**

"* * * since exhaustion [of administrative remedies] is a quasi-jurisdictional problem and one of judicial administration, it is within the discretion of this Court to consider it sua sponte, and we find it appropriate to do so here. * * * Therefore, we do not accept plaintiffs' contention that defendants' failure to take a cross-appeal precludes them from arguing exhaustion on appeal." Champagne v. Schlesinger, C.A.7th, 1974, 506 F.2d 979, 982 (per Cummings, J.).

[8]**Notice of issues**

See Stern, When to Cross-Appeal or Cross-Petition – Certainty or Confusion?, 1974, 87 Harv.L.Rev. 763, 765-766.

sufficient reason to disregard it in the circumstances presented.[9] Such restrained use of the power may provide justice in particularly worthy cases[10] without disrupting the normal flow of appellate business or the important expectations of the parties. . . .

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[9]**No sufficient reason**

United Optical Workers Union Local 408 v. Sterling Optical Co., C.A.2d 1974, 500 F.2d 220, 224.

[10]**Use of power**

Tug Raven v. Trexler, C.A.4th, 1969, 419 F.2d 536, 548, certiorari denied 90 S.Ct. 1843, 398 U.S. 938, 26 L.Ed.2d 271.

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(2)

NO. 84-798

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Plaintiff-Respondant

V.

GEORGE S. McLEAN,
Defendant, Petitioner

PETITIONER'S SUPPLEMENTAL BRIEF INVITING ATTENTION TO A RECENTLY UNCOVERED HARVESTER PROXY STATEMENT WHICH FURTHER SUPPORTS THE PETITIONER'S SCAPEGOAT ARGUMENT.

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February 14, 1985

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NO. 84-798

IN THE
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PETITIONER'S SUPPLEMENTAL BRIEF INVITING ATTENTION TO A RECENTLY UNCOVERED HARVESTER PROXY STATEMENT WHICH FURTHER SUPPORTS THE PETITIONER'S SCAPEGOAT ARGUMENT.

I. REASON FOR SUPPLEMENTAL BRIEF PER RULE 22.6

A recent search for background information to be used in a related civil action uncovered newspaper articles and an International Harvester proxy statement dated September 30, 1982 which provided the final pieces of the puzzle relating to the manner in which the Petitioner is described in the Crawford indictment, the timing of the Harvester guilty plea and the how and why the Government and Harvester joined together to set up the Petitioner as the Harvester scapegoat.

II. HARVESTER FINANCIAL PICTURE

During the year preceding the Crawford indictment and Harvester guilty plea, the Wall Street Journal reported as follows concerning Harvester's financial condition:

1. October 1, 1981: Harvester asks 200 of its worldwide lenders to participate in its new $4.15 billion rescue plan.

2. December 23, 1981: Harvester, on December 22, 1981, said that all 200 banks holding its $4.15 billion of debt agreed to a two-year refinancing package.

3. April 2, 1982: Harvester has told its creditors it will technically be in default on its $4.2 billion loan agreement by the end of April 1982.

4. April 21, 1982: Harvester, in an attempt to avoid having to file under federal bankruptcy law, is renegotiating a $4.2 billion debt restructuring agreement it completed just five months ago.

5. September 14, 1982: Harvester and a committee of its lenders reached tentative agreement as to the terms of a new debt restructuring agreement; Harvester will have a special meeting of its shareholders on October 28, 1982 to seek an increase in the number of its authorized common shares and an approval of an additional offering.

6. October 7, 1982: Harvester presented the grimmest assessment yet of its financial condition in proxy material for an October 28, 1982 special meeting which stated the company's prospects for survival are in substantial doubt and conceded that by October 31, 1982 it could have negative shareholders equity. The company says without the stockholders' approval of the latest debt restructuring, it likely would be forced into bankruptcy proceedings.

On page F-27 of the proxy statement, Harvester's certified public accountants, Deloitte, Haskins & Sells stated that,

> Harvester's continuation as a going concern may be dependent upon successful completion of the financial restructuring and further noted that its financial condition has deteriorated to the point that the company no longer is confident that the resulting liability [of a $3 million suit relating to its former Wisconsin Steel Division], if any, would not materially affect its financial condition.

III. SEPTEMBER 30, 1982 HARVESTER PROXY STATEMENT

There was not a single word of Harvester's potential multimillion dollar liability in the Crawford case mentioned in the September 30, 1982, 104 page proxy statement, although Harvester was a target of the investigation and at that point had been negotiating with the Government for many weeks. Against this background, it is understandable that Harvester could not and would not plead

guilty to any violation relating to the Crawford investigation prior to the October 28, 1982 stockholders' meeting which would determine their survival.

IV. THE CRAWFORD INDICTMENT

On October 18, 1982, the Petitioner, against the advice of his (Harvester appointed and paid for) lawyer, sought to give testimony without immunity to the Houston grand jury. The Government attorney refused, saying it was "too late," although the grand jury continued to hear testimony on October 19, 1982 and the Petitioner was in Houston available to testify on October 19, 1982. The Government lawyers quickly wound up their grand jury business at that point and brought the Crawford indictment to a vote the next day, October 20, 1982.

The FCPA has seven distinctly different classes of violations, three relating to issuers and four to domestic

concerns with widely ranging prescribed penalties. The Eckhardt amendment's purpose is to protect certain Sixth Amendment rights of two of these classes, agents and employees of issuers and domestic concerns. Because of these distinctions, it is necessary to identify each defendant in an FCPA indictment by class.

The Crawford indictment identified each of the defendants as "a domestic concern," "an officer and stockholder of a domestic concern and a domestic concern," "an officer of a domestic concern and a domestic concern," "an agent of a domestic concern," or "an officer of a domestic concern" except for the Petitioner and Uriarte who were described simply as defendants. P. at 5. [1/]

[1/] P. - Petition for Cert.

V. THE CRAWFORD INDICTMENT TIMING PROBLEM

Because the Government was forced to bring the Crawford indictment to a vote prior to the Harvester guilty plea, they were in a technical dilemma. If they described the Petitioner as "an individual of a domestic concern," they would have precluded Harvester's urging to the Court, the press and the S.E.C. that their guilty plea was based solely on a theory of respondeat superior because a corporation is not responsible for criminal activities of its employees outside the scope of their employment. Inland Trucking Co. v. United States, (1960) 281 F.2d 457. On the other hand, if the Government had described the Petitioner as aiding and abetting as "an employee of an issuer," (who reported directly to a corporate officer), then Harvester would have been facing a maximum penalty of $43 million (43 counts

X $1 million) because the act of an employee with the knowledge and consent of the corporation is the act of the corporation in determining criminal responsibility. Morgan v. United States, C.C.A. La. (1945) 149 F.2d 185, cert. denied 326 U.S. 731. (Ruston Gas Turbines was fined $750,000 when they pled guilty to a single substantive count.) P. at 5.

The concept of criminal liability for corporations on the theory of respondeat superior is very narrow in that the conduct of the guilty employee must be the kind he is authorized to perform, it must occur substantially within the authorized limits of time and space, and must be activated at least in part by a desire to serve the employer. United States v. Demauro, C.A. N.Y., 1979, 581 F.2d 50.

The Government was obliged to describe the Petitioner within an FCPA

prescribed class of violator in the Crawford indictment and since the Harvester plea bargain was not yet a fait accompli on October 22, 1982, this created a severe problem for the Government who had no other candidates to set up as the respondeat superior scapegoats other than the Petitioner and Uriarte. The Government also desired to deny them the protection of the Eckhardt amendment. The Government's solution to this dilemma was to describe the Petitioner simply as a "defendant" and hope no defense lawyer revealed their chicanery.

VI. THE GOVERNMENT'S CHANGING POSITION

After the Harvester plea, the Government shifted gears. During a May 23, 1983 hearing while arguing against the Petitioner's motion to dismiss based on the Eckhardt amendment, the Government lawyer said,

"Our theory has been consistent not

> only before the Harvester plea, but at the time of the return of the indictment, October of 1982, almost a month before Harvester pled. That is, we are presented with a factual pattern where employees of an issuer engaged in conduct as conspirators, co-conspirators and aiders and abettors. That is specifically set forth in the indictment and there is no attempt to circumvent the factual conduct that is alleged, both for defendant Uriarte and defendant McLean. The issue as the Government sees it for the Court is a very simple one. In this kind of factual pattern where you have employees of an issuer and indeed an issuer, co-conspiring, aiding and abetting others, other classes, how do you charge them?" Tr. at 20, 21 (emphasis added).

Yet in the Government's brief on appeal they stated,

> "The theory of prosecution is not that appellees, employees of an issuer, violated §77dd-1(a). Rather, the Government's theory was that appellees as individuals aided and abetted Crawford Enterprises, a domestic concern, in a violation of §78dd-2(a)." Br. at 22 (emphasis added).

But during the ensuing Fifth Circuit hearing, the Government conceded the Petitioner acted only on behalf of and for the benefit of his employer, Harvester,

and that the Petitioner was not a renegade employee. United States v. McLean, 738 F.2d 655 at 659. (Emphasis added.)

VII. THE HARVESTER PLEA BARGAIN

It is now history that Harvester successfully urged respondeat superior on their trial court with the Petitioner and Uriarte named but not charged as their scapegoats. The acceptance by the Court of this plea resulted in a $10,000 fine and saved Harvester from facing a multi-million dollar liability and possible bankruptcy. P. at 5-10.

And by falsifying material statements in the offer of proof, e.g. "Neither Solar employee [Uriarte and the Petitioner] held a position which required him to report to International Harvester management. There has been no evidence that any officers, directors or management knew of or participated in the conspiracy charged in the information," and by withholding certain

key factual information, the Harvester and Government lawyers did successfully conceal from the Harvester trial court, the S.E.C., the press and Harvester's lenders, stockholders and employees certain critical facts in the case, namely that,

1. The Petitioner and Sievert were part of Harvester's corporate management.

2. Sievert was also a corporate vice-president and officer.

3. The Petitioner reported directly to Sievert.

4. Sievert was still designated as a target at the time of the plea.

5. The Government considers Sievert a co-conspirator.

6. Sievert was a participant in Overt Act No. 24 in the Crawford case which was omitted from the Harvester case.

7. Sievert and not the Petitioner participated in the January 24, 1979 meeting described in Overt Act No. 11.

Each and every one of the above described falsifications or omissions was required to support the theory of respon-

deat superior.

VIII. SUMMARY

The McLean court at 659 recognized that an objective of the Eckhardt amendment is to prevent the employer from making its employee a scapegoat. In this case, Harvester could not have succeeded in their effort without the conspiratorial assistance of the Government lawyers who falsified the Harvester court papers, with absolute personal immunity, Yaselli v. Goff, 275 U.S. 503 (1927), and have selectively prosecuted the Petitioner in the Crawford case in an unconscionable scenario apparently overlooked by Rep. Eckhardt.

Trial in the Crawford case, which has been estimated by the prosecution to last 12-14 weeks, is now scheduled to begin March 4, 1985 in Houston, Texas. This will be particularly burdensome for the Petitioner and his family.

This supplementary brief completes the picture of a situation of abuse of power by the Government lawyers, which includes their violation, with immunity, of laws they should be enforcing, e.g. 18 U.S.C. §1001 and 18 U.S.C. §371, and circumvention of the Eckhardt provisions of the F.C.P.A. The Petitioner respectfully asks the Court to issue its Writ of Certiorari.

Respectfully submitted,

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No. 84-798

In the Supreme Court of the United States

OCTOBER TERM, 1984

GEORGE S. McLEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, on the government's appeal from the district court's order dismissing the substantive counts of the indictment, the court of appeals correctly declined to consider petitioner's challenge to the district court's denial of his motion to dismiss the conspiracy count.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 738 F.2d 655. The opinion of the district court (Pet. App. 17a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1984, and a petition for rehearing was denied on September 19, 1984 (Pet. App. 16a). The petition for a writ of certiorari was filed on November 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1.a. A 49-count indictment was filed on October 22, 1982, in the United States District Court for the Southern District of Texas. It charged Crawford Enterprises, Inc., (CEI) and nine individuals, including petitioner, with conspiracy to use interstate and foreign instrumentalities for

the purpose of bribing officials of Pemex, an oil company owned by the Republic of Mexico (Count 1), 47 completed substantive acts (Counts 2-48), and obstruction of justice (Count 49), in violation of 18 U.S.C. 371, 15 U.S.C. 78dd-2(a)(1) and (3), 15 U.S.C. 78dd-2(b), and 18 U.S.C. 1503. Petitioner was named in the conspiracy count and in 43 of the counts charging substantive violations of 15 U.S.C. 78dd-2, a section of the Foreign Corrupt Practices Act (FCPA). In those 43 counts, petitioner was alleged to have aided and abetted seven of his co-defendants in the criminal conduct. See 18 U.S.C. 2.

The indictment alleged that petitioner was a vice-president of Solar Turbines International, a division of International Harvester Company, which was not named as a defendant in the indictment. However, on November 18, 1982, International Harvester entered a plea of guilty to a one-count information charging conspiracy to violate the FCPA, in violation of 18 U.S.C. 371. One condition of the plea agreement was that International Harvester would not be charged with any other offenses arising out of its sales to CEI and Pemex. Pet. App. 4a-6a.

b. Prior to his trial, petitioner filed a motion to dismiss all counts of the indictment against him.[1] Petitioner contended that the theory of criminal liability advanced by the government was premised solely upon conduct performed by petitioner in his capacity as International Harvester's employee. Petitioner then cited certain penalty provisions of the FCPA, commonly known collectively as the Eckhardt Amendment, that set forth maximum prison terms

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[1]Petitioner was joined in this motion by co-defendant Luis A. Uriarte. On September 29, 1983, Uriarte entered a plea of guilty to an information charging him with being an accessory after the fact with respect to one of the violations of the FCPA. See 18 U.S.C. 3. The remaining charges against Uriarte were dismissed. Pet. App. 8a n.3.

and fines for employees and are applicable only if the employer "is found to have violated" the FCPA. 15 U.S.C. 78dd-2(b)(3) and 78ff(c)(3). Petitioner argued that the Eckhardt Amendment requires that a corporate employer actually be convicted of a violation of the FCPA as a precondition to convicting an employee. In this case, petitioner pointed out that his employer, International Harvester, had been convicted only of a violation of 18 U.S.C. 371, which is not a provision of the FCPA, and that under the plea agreement, International Harvester would not be charged with a violation of any section of the FCPA. Because his employer had not been and would not be convicted of violating the FCPA, petitioner argued that, under 15 U.S.C. 78dd-2(b)(3), he should be relieved of all criminal liability as well. Following a hearing, the district court held that all substantive FCPA counts of the indictment must be dismissed on this ground, but not the conspiracy count (Pet. App. 17a-18a).

2. The government appealed the order of the district court insofar as it dismissed the substantive counts of the indictment, but petitioner did not take a cross-appeal from that order insofar as it denied his motion to dismiss the conspiracy count. The court of appeals affirmed the dismissal of the substantive FCPA charges against petitioner. Pet. App. 1a-15a.[2] However, the court denied petitioner's request that it also order the district court to dismiss the conspiracy count. It explained (Pet. App. 15a n.10):

> McLean urges us to invoke "our equitable powers" and dismiss the conspiracy count still pending against him. Since McLean has not filed a cross-appeal, this issue is not properly before us. In addition, a denial of a motion to dismiss an indictment is not ordinarily a

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[2]The government has not sought further review of the court of appeals' decision affirming the dismissal of the substantive counts.

final decision for purposes of 28 U.S.C. § 1291 (1976) and is therefore unappealable. *See United States v. Sisk*, 629 F.2d 1174, 1180 (6th Cir. 1980, *cert. denied*, 449 U.S. 1084, 101 S. Ct. 871, 66 L. Ed. 2d 809 (1981)); *Abney* v. *U.S.*, 431 U.S. 651, 662-63, 97 S. Ct. 2034, 2041-42, 52 L. Ed. 2d 651 (1977); *U.S. v. Rey*, 641 F.2d 222, 224 (5th Cir. 1981).

ARGUMENT

1. Petitioner contends (Pet. 16-20) that the court of appeals erred in ruling that because he did not take a cross-appeal, it would not consider his challenge to the denial of his motion to dismiss the conspiracy count. Contrary to petitioner's contention, however, the court of appeals' decision is consistent with a long and unbroken line of decisions of this Court holding that, in the absence of a cross-appeal or cross-petition, a prevailing party may not attack a portion of a judgment below that is adverse to him, with a view either to enlarging his own rights or restricting the rights of his opponent. See, *e.g.*, *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *Alaska Industrial Bd.* v. *Chugach Electric Ass,n*, 356 U.S. 320, 324-325 (1958); *Penfield Co.* v. *SEC*, 330 U.S. 585, 594 (1947); *LeTulle* v. *Scofield*, 308 U.S. 415, 421-422 (1940); *Helvering* v. *Pfeiffer*, 302 U.S. 247, 250-251 (1937); *Langnes* v. *Green*, 282 U.S. 531, 538-539 (1931); *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924). "The rule is inveterate and certain." *Morley Constitution Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191 (1937).

Petitioner's reliance upon *French* v. *Estelle*, 696 F.2d 318 (5th Cir. 1982), is misplaced. That case merely holds, consistently with well established precedent, that the ruling of a lower court may be *affirmed* on any ground supported by the record, even though the court below did not consider it. 696 F.2d at 319-320. See *United States* v. *New York Telephone Co., supra; Helvering* v. *Pfeiffer, supra; Langnes*

v. *Green, supra*. It does not suggest, as petitioner urges here, that a portion of a judgment may be reversed by a court of appeals if the party aggrieved has not filed a cross-appeal challenging that aspect of the judgment.[3]

2. As the court of appeals correctly concluded, even if petitioner had attempted to take a cross-appeal, his claim would be premature. Petitioner's asserted right of appeal must rest on 28 U.S.C. 1291, which limits the jurisdiction of the courts of appeals to review of "final decisions of the district courts." The determination in this case by the district court that the conspiracy count survives despite the absence of a conviction of petitioner's employer of a substantive violation of the FCPA clearly is not a "final decision" that is subject to appellate review under 28 U.S.C. 1291 prior to the entry of a final judgment.

To be sure, a narrow exception to the final judgment rule has been recognized for an order that conclusively determines the disputed question, resolves an important issue completely separate from the merits of the action, and is effectively unreviewable on appeal from a final judgment. *Flanagan* v. *United States*, No. 82-374 (Feb. 21, 1984), slip op. 6; *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). However, as this Court stressed in *Flanagan*, the collateral order exception to the final judgment rule must be interpreted with the "utmost strictness" in criminal cases. Slip op. 6. In this case, we may assume arguendo that petitioner's claim that the indictment does not charge a prosecutable offense satisfies the first two prongs of the

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[3]Petitioner, a non-indigent non-lawyer who has persisted in representing himself, cannot escape the application of the cross-appeal requirement by claiming ignorance of the rules as a result of a lack of legal training (Pet. 19). Petitioner is "literate, competent, and understanding, and * * * [is] voluntarily exercising his informed free will." *Faretta* v. *California*, 422 U.S. 806, 835 (1975). He has assumed the risk of noncompliance with well established procedural rules.

collateral order test. But his claim fails to satisfy the third prong, because it plainly is not effectively unreviewable on appeal from a final judgment.

Petitioner's argument that the conspiracy count should be dismissed implicates no constitutional provision; it presents a straightforward question of statutory construction. It is true that because the district court's construction of the statute differs from that urged by petitioner, he will be required to stand trial on that count. But if he is convicted, petitioner can renew his Eckhardt Amendment defense on appeal from that judgment of conviction. If the court of appeals agrees at that time that the conviction cannot stand because petitioner's employer was not convicted of a substantive violation of the FCPA, it can afford full relief by reversing the conviction. Review prior to that time therefore would be interlocutory and premature. *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982); *United States* v. *Harper*, 729 F.2d 1216 (9th Cir. 1984); *United States* v. *Hashagen*, 716 F.2d 1454 (5th Cir. 1983); *United States* v. *Yellow Freight System, Inc.*, 637 F.2d 1248, 1251 (9th Cir. 1980), cert. denied, 454 U.S. 815 (1981).

Petitioner attempts (Pet. 16-17) to compare his statutory claim to the Double Jeopardy claim involved in *Abney* v. *United States*, 431 U.S. 651 (1977), which the Court held could be raised on appeal prior to entry of a final judgment. However, the Double Jeopardy Clause, like the Speech or Debate Clause involved in *Helstoski* v. *Meanor*, 442 U.S. 500 (1979), establishes a constitutional right not to be tried. See *Flanagan* v. *United States*, slip op. 7. That right obviously would be "irretrievably lost if review were postponed until trial is completed" (*ibid.*). By contrast, the statutory provision upon which petitioner relies, 15 U.S.C. 78ff(c)(3), does not by its terms confer a right not to be tried. It merely conditions an employee's conviction and sentence upon a finding that the employer violated the FCPA. See

also H.R. Rep. 95-640, 95th Cong., 1st Sess. 11 (1977), quoted at Pet. App. 11a (an agent "shall not be subject to the penalties of the bill" unless it is shown that the employer violated the Act).

3. In any event, even if petitioner's claim had been properly presented to the court of appeals, he would not have been entitled to relief. The court of appeals held that there was not an adequate predicate for prosecuting him for substantive violations of the FCPA, because the FCPA expressly requires a finding that the employer violated the FCPA itself, yet International Harvester was convicted of violating only the general conspiracy statute, 18 U.S.C. 371, which is not part of the FCPA. But the remaining count of the indictment still pending in the district court, unlike the dismissed counts, does not charge petitioner with violating the FCPA. It charges him with violating 18 U.S.C. 371, which does not contain any similar requirement that his employer be found to have violated a substantive provision of the FCPA or any other statute.

Petitioner argues, however, that the conspiracy count under 18 U.S.C. 371 is based on nothing more than "derivative liability, aiding and abetting, that is barred from prosecution" by the Eckhardt Amendment. Pet. 15. There is no merit to this argument. Conspiracy is universally recognized as an offense separate and distinct from the substantive criminal conduct that constitutes the object of the conspiracy. *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975); *Pinkerton* v. *United States*, 328 U.S. 640 (1946). This is not a novel proposition. Congress, which is "predominantly a lawyers' body," *Callanan* v. *United States*, 364 U.S. 587, 594 (1961), presumably was familiar with the distinct nature of conspiracy and substantive charges when it enacted the FCPA. See *Albernaz* v. *United States*, 450 U.S. 333, 341 (1981). If Congress also had desired to exempt employees from being convicted for participating in a

conspiracy that had as an object conduct that would violate the FCPA unless their employers had first been found to have actually violated the FCPA, it surely knew how to say so. But nothing in the FPCA manifests such an intent. And even assuming the propriety of an inquiry into the legislative history when the language of the statute is unambiguous (but see *Albernaz* v. *United States*, 450 U.S. at 336), petitioner has pointed to no clearly expressed legislative intention that is contrary to the statutory language and is supportive of his position. *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Petitioner is in any event impaled upon the horns of a dilemma in the circumstances of this case. Either a Section 371 conspiracy to violate the FCPA is properly to be treated as a form of FCPA offense, or it is not to be so treated. If International Harvester's conspiracy conviction, as the court of appeals concluded, does not satisfy the Eckhardt Amendment, then it necessarily follows that the same charge against petitioner is not sheltered by the Amendment either. Conversely if, as petitioner now seems to contend, the conspiracy charge against him should be treated functionally as coming within the FCPA and the Eckhardt Amendment, then the company's conviction removes whatever shield the Amendment would have provided had the company not been convicted. But the only possible consequence of that view is not that the conspiracy charge should be dismissed, but that the courts below may have erred in dismissing the substantive charges against petitioner.[4]

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[4]We have been informed by the Justice Department attorney responsible for the prosecution that the trial, which has not been stayed, is scheduled to begin on March 4, 1985.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 84-798

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Plaintiff-Respondant

V.

GEORGE S. McLEAN,
Defendant, Petitioner

PETITIONER GEORGE S. McLEAN'S REPLY BRIEF

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February 26, 1985

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NO. 84-798

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
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V.

GEORGE S. McLEAN,
Defendant, Petitioner

PETITIONER GEORGE S. McLEAN'S REPLY BRIEF

The Petitioner, George S. McLean, submits this brief in compliance with Rule 22.5 to address statements made and arguments raised in the Government's brief in opposition. Comments are made in the page

sequence of the Government's brief.

Page 2. Uriarte pled guilty on September 29, 1983 (Gov't Br. N.1) because Harvester declined to pay his legal and other expenses associated with opposing the Government's appeal. (The district court order dismissing the 43 counts was entered June 24, 1983; the notice of appeal was filed July 22, 1983; the Government's appeal brief was filed October 11, 1983 after exhausting all possible statutory extensions.)

Page 3. McLean did indeed argue that the Eckhardt Amendment requires that a corporate employer actually be convicted of a violation of the FCPA, but he was quoting from a published article by Richard S. Shine [1/] which stated,

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[1/] Richard S. Shine was chief of the multinational fraud branch of the Criminal Division of the Dept. of Justice from April 1977 until September 1982, and in that capacity was responsible for the enforcement of the FCPA.

> "in order to charge an employee or agent with a criminal violation of the antribribery provisions of the Act, either the issuer or domestic concern must have already been convicted or must be prosecuted simultaneously with the agent or employee." The New Review Procedure Under the Foreign Corrupt Practices Act II, Law and Business Inc., Harcourt, Brace, Jovanovich Publishers (1980) (Appendix II) pages 5,6. (Emphasis added.)

McLean considered that it was a reasonable assumption that this statement was the Justice Department's interpretation of the Eckhardt Amendment, considering Mr. Shine's responsibilities within the Department.

The Government misstates that the district court held that the conspiracy count must not be dismissed on the ground of the Eckhardt Amendment. The fact is, the district court denied this part of McLean's motion to dismiss without comment. (Pet. 18a)

Page 4. The Government does not comment on McLean's argument concerning

the jurisdictional aspects of cross-appeal presented from Wright's Federal Practice and Procedure at 415-418, but relies on an out of context misinterpretation of French v. Estelle, 696 F.2d 318 (5th Cir. 1982) while ignoring the fact that the failure of the pro se defendent in Estelle to file a formal cross-appeal did not preclude the Fifth Circuit from reviewing the defendant's Constitutional claim and this prevented a miscarriage of justice, id. at 320.

Page 5. The Government's brief describes the Petitioner, McLean, as "a non-indigent non lawyer who has persisted in representing himself." McLean has never claimed to be an indigent in the sense of a Clarence Earl Gideon whose defense costs would not have exceeded a couple of hundred dollars. Immediately after Harvester pled guilty

with McLean [2/] as its scapegoat, they withdrew their guarantee of any further legal fees, which were estimated at $200,000 based on a trial date in the summer of 1983. (The central defendants in the case, CEI and Donald Crawford, have reportedly already spent several millions of dollars in legal fees.) The Fifth Circuit determined that "Harvester would have no incentive to assist McLean in his defense; in fact, Harvester would have every incentive to shift as much culpability as possible to McLean." United States v. McLean, 738 F.2d 655 at 659. McLean has motioned for court appointed counsel, or alternately, for Harvester to be compelled to pay his legal costs and has been denied. McLean

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[2/] McLean had worked 18 years for Harvester and devoted his energies to the company's best interests.

refuses to sell his fixed assets, e.g. his home, which are jointly owned with his wife, in order to hire competent counsel and he has also refused to waive his Sixth Amendment rights to counsel and witnesses for his defense. McLean is defending himself because he has no other acceptable choice which is affordable. This apparently bothers the Government. 3/

Page 6. The legislative history of the Eckhardt Amendment illustrates the concern of Congress that an employee might be made a scapegoat and denied his Sixth Amendment rights, e.g. to counsel and witnesses to rebut his involvement. The practical effect of the $1 million fine per violation was to compel the corporation to bring in the witnesses

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3/ The trial is now delayed until April 8, 1985 due to the court congestion and an ongoing quest by the Government for Swiss evidence.

which would then be available to the employee. The Eckhardt Amendment statute 15 U.S.C. §78ff(c)(3) is the guarantee to the employee that he cannot be prosecuted without his Sixth Amendment rights intact.

There is no evidence in its June 24, 1983 Memorandum and Order that the district court looked beyond the wording of the statute in making its determination of the application of the Eckhardt Amendment.

The Fifth Circuit recognized in McLean, supra, at 659, that the Eckhardt Amendment was precisely intended to prevent McLean from being prosecuted without the availability of his employer's resources and knowledge.

Page 7. The Government's treatment of the 18 U.S.C. §371 issue is erroneous. Neither the FCPA nor the Eckhardt Amendment specifically addresses the question

of the rights and liabilities of persons who allegedly conspire to violate the FCPA. A fair construction of the FCPA and the Eckhardt Amendments compels the conclusion that Congress intended that the Government could indict Harvester on multiple counts (FCPA violations plus conspiring to violate the FCPA), but McLean should not be charged with any violations involving the FCPA unless Harvester was first charged with a substantive count of violating the FCPA.

Page 8. The Government contends that Congress would have specifically addressed the conspiracy issue if they intended a conspiracy charge to be included under the umbrella of protection of the Eckhardt Amendment.

The legislative history clearly shows that Congress intended to prevent the corporation from making an employee its scapegoat. Congress cannot be

faulted for failure to foresee that the Government would charge McLean with conspiracy in the Crawford case in support of the establishment of McLean as the scapegoat necessary under the theory of respondeat superior in the Harvester case in an obvious "end-run" maneuver intended to negate the protection of the Eckhardt Amendment. McLean, id. at 660.

There should be no need for Congress to specifically protect employees against illegal and otherwise infamous actions of the Government to circumvent the law when it is the Government's responsibility to enforce the law.

The Petitioner McLean's position in this case appears to be the same as the position of the fictional "Joe Bloke" who was the subject of comments by Congressman Eckhardt in discussing his amendment and H.R. 3815 in a hearing. Eckhardt stated:

> "Indeed the corporations [sic] interest might even be in conflict with that of the agent. The corporation might desire to have Joe Bloke found to have intentionally engaged in bribery and to have been the sole moving agent, that is, the company never agreed to it and the quicker they can convict Joe Bloke, the better off the company is. It is relieved of responsibility and it has a sacrificial lamb in Rome and everybody forgets about the activity."
> Cited in McLean, supra, at 658.

In view of the Government's failure to comply with the mandate of the Eckhardt Amendment by charging Harvester with a substantive violation of the FCPA, Count One of the Indictment against McLean should be dismissed.

RESPECTFULLY SUBMITTED THIS 26TH DAY OF FEBRUARY 1985.

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NO. 84-798

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

UNITED STATES OF AMERICA,
Plaintiff-Respondant

V.

GEORGE S. McLEAN,
Defendant, Petitioner

PETITIONER'S SECOND SUPPLEMENTAL BRIEF INVITING ATTENTION TO RECENT DEVELOPMENTS IN THE PROSECUTION OF UNITED STATES V. CEI, ET AL, CR. NO. H-82-224 AND THE BACKGROUND TO McLEAN'S PRO SE POSITION

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March 7, 1985

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PETITIONER'S SECOND SUPPLEMENTAL BRIEF INVITING ATTENTION TO RECENT DEVELOPMENTS IN THE PROSECUTION OF UNITED STATES V. CEI, ET AL, CR. NO. H-82-224

The Petitioner, George S. McLean, submits this supplemental brief in compliance with Rule 22.6 to bring to the Court's attention recent developments in the U.S. v. CEI, et al, Cr. No. H-82-224, and a recent-

ly filed civil suit which are relevant to this Petition.

The Government lawyers have made an issue of McLean's pro se position which warrants a complete airing. A chronological explanation is presented below.

1. PETITIONER McLEAN'S PRO SE POSITION

In early January 1980, Harvester selected and paid for a Los Angeles lawyer to represent both McLean and Uriarte during the Pemex investigation. By the summer or early fall of 1982, Uriarte had become dissatisfied with this lawyer's representation and hired a lawyer of his own choosing in Washington, D.C. Harvester approved of this change, but on November 12, 1982, expressed their concern for the bills for services rendered on behalf of Uriarte.

McLean first heard the rumors of a Harvester plea bargain negotiation on November 3, 1982, which Harvester

would not confirm. McLean first learned that he had been set up as a "scapegoat," along with Uriarte, when he attended the Harvester court hearing in Houston on November 18, 1982. After the hearing, McLean advised the Harvester lawyers of his anger and displeasure with Harvester's plea bargaining action and Harvester's acquiescence in the Government's description of McLean as a criminal. In a heated discussion with the Harvester counsel of record, McLean was twice advised that if he "declared war" on Harvester, Harvester would drop its support, i.e., support in the sense of paying McLean's legal fees. This Harvester lawyer immediately phoned McLean's lawyer in Los Angeles and advised him of the argument.

Then, on or about November 22, 1982, Harvester notified McLean's lawyer that Harvester would not guarantee

McLean's legal fees. McLean's lawyer in turn notified McLean that he would not continue with McLean's case unless he was assured that the payment of his estimated $200,000 fee would be secured by an irrevocable letter of credit or McLean's personal promissory note for $200,000 appropriately collateralized. McLean could not obtain the necessary outside backing and on January 3, 1983 advised his lawyer that he would agree to a decision to release him from any further obligations in the case. (McLean did not hire him, and therefore could not release him.)

Harvester continued their refusal to pay Uriarte's self chosen lawyer and finally released him in late December 1982.

In early 1983, the Harvester lawyers, Kirkland & Ellis, selected the Houston firm of Vinson & Elkins to take

Uriarte's case. Vinson & Elkins accepted the case as an "accommodation" to International Harvester and Kirkland & Ellis. [1]

In early January 1983, McLean first motioned the Court to appoint counsel or to compel Harvester to pay for the lawyer of his choice. This and subsequent similar motions were denied.

A hearing was held on April 4, 1983, at the Government's request, regarding counsel for the Petitioner's defense.

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[1] Uriarte advised the Petitioner that his Vinson & Elkins attorney first tried to convince him to plea bargain, which he rejected. Shortly after the Government filed its notice of appeal of the dismissal of 43 counts, Harvester advised Uriarte they would not pay his legal fees to counter the Government's appeal, nor would they pay any of his personal expenses associated with the case, such as travel from his home in Miami to Houston. By August 1983, Harvester was threatening to completely drop Uriarte's legal support. At this point, he decided to accept the Government's plea bargain offer.

The Court advised McLean of the importance of counsel and subsequently after reviewing his financial records again refused to appoint counsel, presumably because McLean did not meet the "pauper" test. The Court also suggested at the hearing that McLean sue Harvester for legal fees. [2/]

McLean has been unable to raise the money necessary for competent counsel, as well as his own personal expenses associated with his defense and has proceeded pro se as the only realistic solution. However, McLean has also steadfastly made it clear to the trial court in writing and verbally in hearings that

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[2/] McLean subsequently filed a suit against Harvester on October 22, 1984 in Federal District Court in Houston for legal costs and other damages arising from the illegal actions taken against McLean by Harvester in conspiracy with the Government.

he has not and will not waive his Sixth Amendment rights to competent counsel and witnesses for his defense.

The Government argues in their brief (Gov't. 5) that McLean cannot escape the application of the cross-appeal requirement by claiming ignorance of the rules citing Faretta v. California, 422 U.S. 806, 835 (1975). However, in Faretta a choice was made to waive counsel, while in the instant case McLean has been denied his request for Court appointed counsel because he does not qualify as an indigent. But McLean has very specifically not waived his Sixth Amendment rights. Only if McLean had waived his right to counsel would McLean have no right to complain that his pro se representation prevented him from understanding the cross-appeal rules. People v. Heidelberg (1975) 338 N.E. .2d 56.

McLean's Sixth Amendment rights to

counsel and a jury trial encompass a right to have his theory of the case argued vigorously to the jury. U.S. v. DeLoach (1974) 504 F.2d 185. And McLean's theory is that the Government and Harvester joined together to use McLean as a pawn and set him up as the scapegoat. McLean could hardly press this theory through counsel beholden to Harvester, because when an attorney is paid by someone other than the client to represent the client, there is a real and present danger that the attorney may in actuality be representing not the best interests of his client but those of his compensator. In re Michaelson, C.A. Nev. 1975, 511 F.2d 882 at 888, cert. denied, 421 U.S. 978. The Fifth Circuit recognized the ugly truth when they stated, "Harvester would have no incentive to assist McLean in his defense; in fact, Harvester would have every incentive to shift as much

culpability as possible to McLean." United States v. McLean, 5th Cir. 1984, 738 F.2d 655, 659.

2. EXPORT IMPORT BANK CIVIL SUIT

On February 25, 1985, the United States of America and the Export Import Bank filed a civil suit stemming from the Crawford criminal case. The Petitioner, McLean, is named as a defendant along with Harvester, CEI, Donald G. Crawford and others. McLean is again charged with allegedly conspiring to rig bid prices with much of the language lifted directly from the Crawford indictment. The Government's act of conspiring to establish McLean as Harvester's scapegoat has now resulted in McLean being unfairly and illegally named in this civil suit, which will drain more of his energy and personal resources. The Fifth Circuit in the United States v. McLean id. determined at 659 that a major objective

of the Eckhardt Amendment is to prevent the employer from making its employee a scapegoat. The naming of McLean as a defendant in this suit can only be viewed as vindictiveness on the part of the Government because McLean has revealed their chicanery to the Courts.

3. SWISS AND BAHAMIAN DEPOSITIONS

In late November 1984, depositions were taken in Zurich, Switzerland concerning bank evidence the Government had secured through government to government negotiations. At these deposition hearings it was learned that a supplementary request for additional evidence made in 1983 might lead to additional evidence being available in April 1985. On February 28, 1985, the Government filed a Notice of a Deposition to be held the week of March 11, 1985 in Nassau, Bahama also concerning bank records. McLean draws attention to the fact that the

Government has motioned on several occasions for continuances in order to gather their evidence, which they should have possessed prior to the indictment being filed over two years ago. However, when McLean, on October 18, 1982, asked to give evidence without immunity to the Houston grand jury, he was told by the prosecutor it was "too late" and the Government packed up the grand jury the next day. The Government's brief identifies McLean as a "non-lawyer" (Gov't 5). [3/] McLean is in fact an engineer and as such is very familiar with balancing levers. McLean sees very little balance in the Government's act of abruptly terminating the term of the Houston grand jury on October 20, 1982 under the banner of judicial economy

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[3/] Petitioner McLean is a 1958 engineering graduate of Cornell University and has practiced in the fields of mechanical and electrical engineering for over 26 years.

after close to four years of grand jury testimony, while on the other side of the fulcrum the Government would continue to spend many thousands of dollars gathering overseas evidence through government to government channels over a 29 month period.

Rep. Eckhardt expressed considerable concern in the House hearings over the ability of an individual defendant to put up a defense which could counter the case presented by the Government made possible by their almost limitless resources and ability to bring in foreign witnesses. The Eckhardt Amendment was intended to right this potential imbalance by providing a $1 million fine per violation of the FCPA, which would compel the major corporation to contend charges made against it and bring in witnesses which could also be used for the employee's defense.

The Petitioner respectfully asks the Court to issue its Writ of Certiorari.

Respectfully submitted,

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